No. 13092

United States
Court of Appeals
For the Ninth Circuit.

OREGON AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, BEULAH MORRIS and WILLIAM MORRIS,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the District of Oregon

Civil No. 5890

UNITED STATES FIDELITY and GUARANTY COMPANY, a Corporation,

Plaintiff,

vs.

OREGON AUTOMOBILE INSURANCE COMPANY, RAYMOND SUTER, WILLIAM MORRIS, BEULAH MORRIS, HOUK MOTOR COMPANY and REDMOND MOTOR COMPANY,

Defendants.

PETITION FOR DECLARATORY JUDGMENT

Comes now the plaintiff and for cause against these defendants, and each of them, and alleges as follows:

I.

That at all times herein mentioned, United States Fidelity & Guaranty Company is and was a corporation, duly organized and existing under and by virtue of the laws of the state of Maryland, and had qualified and was doing business in the state of Oregon, and elsewhere, as an insurance company.

II.

That the defendants, Oregon Automobile Insurance Company, Raymond Suter, Houk Motor Com-

pany and Redmond Motor Company are residents of the state of Oregon.

III.

That the defendants, Beulah Morris and William Morris are residents of the state of Washington.

IV.

That this controversy involves an amount over and above the sum of $3000.00, exclusive of interest, costs and attorneys' fees.

V.

That at all times herein mentioned, the above-named plaintiff, for a good and valuable consideration paid to it by Raymond Suter, did make, execute and deliver to the said Raymond Suter, a certain policy of insurance covering a certain Plymouth Club Coupe automobile, motor #P18-138404, which policy was at all times in full force and effect, a substantial copy of which policy is hereto attached and marked "Exhibit A," and made a part and parcel of this petition as though fully and particularly set forth and plead at this place, and by reference thereto, each and every provision thereof is made a part and parcel of this petition.

VI.

That the limit of liability in said policy executed by this plaintiff as hereinabove particularly recited is the sum of $5000.00 for bodily injury to each person, and $10,000.00 limited to each accident.

VII.

That the defendant, Oregon Automobile Insurance Company, a corporation, of the state of Oregon, carrying on an insurance business in the said state, and elsewhere, had at all times herein mentioned for a good and valuable consideration, made, executed and delivered to Houk Motor Company and Redmond Motor Company, a certain policy of insurance, a copy of the material part of which is hereto attached marked "Exhibit B," and made a part and parcel of this petition as though fully and completely set forth and alleged at this place, and that at all times herein mentioned, the said insurance policy was in full force and effect, which said policy did cover the operation of the Mercury automobile hereinafter referred to.

VIII.

That on or about the 15th day of October, 1949, the defendant, Raymond Suter, at the request and with the full consent and knowledge of defendants, Houk Motor Company and Redmond Motor Company, was driving and operating a certain Mercury automobile, belonging to the said defendant, Houk Motor Company or Redmond Motor Company, bearing dealer's license #A 75.

IX.

That on or about the 15th day of October, 1949, while so driving the said Mercury automobile, the defendant, Raymond Suter, did run into and collide with an automobile, being driven on U. S.

Highway #97, in which Beulah Morris was riding as a passenger, in such a way and manner that the said Beulah Morris did receive certain personal injuries.

X.

That thereafter the said Beulah Morris did bring an action at law for personal injuries in the county of Deshutes, Oregon, commonly known as case #7780, in which she named Raymond Suter, Houk Motor Company, a corporation, and James Stuchlik as defendants; that thereafter and on about the 20th day of November, 1950, the said case was tried in Deschutes County resulting in a verdict and judgment against the defendant, Raymond Suter, in the sum of $7,360.00, a copy of which judgment as entered in Deschutes County, is hereto attached and marked the plaintiff's "Exhibit C," and by reference is made a part and parcel of this petition as though fully and completely set forth and plead at this place.

XI.

That the said judgment is now in full force and effect, has not been appealed from and has not been satisfied, and that the full amount thereof, together with interest, and costs of the said trial, is due and payable.

XII.

That the said Beulah Morris did, during the pendency of the action in the County of Deschutes hereinabove particularly described, bring an action at law for damages over the same accident as hereinabove described in the County of Marion, state

of Oregon, which action was entitled, "Beulah Morris vs. Raymond Suter and James Stuchlik."

XIII.

That the said Raymond Suter and the United States Fidelity & Guaranty Company did demand and continue to demand that the Oregon Automobile Insurance Company represent and defend the said Raymond Suter in both of the above-described actions brought by Beulah Morris.

XIV.

That William Morris, the driver and operator of the automobile in which the plaintiff, Beulah Morris, was riding at the time of the collision with the defendant, Raymond Suter, has now brought an action in the state of Oregon, County of Deschutes, demanding judgment against Raymond Suter, Redmond Motor Company and James Stuchlik, defendants, for the sum of $9,250.00, for personal injuries and property damages caused by the said accident hereinabove particularly described; That demand has been made upon the Oregon Automobile Company that they accept coverage and defend this action for the benefit of the said Raymond Suter under their policy of insurance, a copy of which is hereto attached and marked plaintiff's "Exhibit B."

XV.

That the Oregon Automobile Insurance Company has failed and refused to accept coverage for the said Raymond Suter, and failed and refused to defend the said Raymond Suter in any one of the

causes of action, and that due to the said refusal on the part of the Oregon Automobile Insurance Company, this plaintiff was forced to, and did employ attorneys to represent the said Raymond Suter in the County of Marion, and that said cause of action was abandoned, and that said plaintiff was required to and did pay reasonable attorneys' fees and costs in the sum of $223.20, in that cause of action.

XVI.

That due to the failure of the Oregon Automobile Insurance Company to represent and defend Raymond Suter in the action of Beulah Morris vs. Raymond Suter in Deschutes County, this plaintiff was forced to and did employ an attorney to represent the said Raymond Suter, and did pay the said attorney a reasonable attorney fee in the sum of $428.80 to so do, and an additional sum of $93.83 expense was paid by it.

XVII.

That due to the denial of liability by the Oregon Automobile Insurance Company to the said Raymond Suter in the action of William Morris vs. Raymond Suter, and others, now on file in Deschutes County, Oregon, this plaintiff will be required to employ attorneys to defend the said Raymond Suter and represent him in said case and cause at an additional expense not now known to this plaintiff.

XVIII.

That the defendants, William Morris, Beulah Morris, Raymond Suter and Oregon Automobile

Insurance Company, are now claiming, contending and demanding that the plaintiff, United States Fidelity & Guaranty Company, under and by virtue of its insurance policy, copy of which is hereto attached and marked "Exhibit A," is required to accept liability and defend the action brought by William Morris against Raymond Suter, hereinabove described, in the Circuit Court of the State of Oregon for Deschutes County; That the said defendants are further claiming and contending that the United States Fidelity & Guaranty Company is required to partially satisfy the judgment in the action of Beulah Morris vs. Raymond Suter, Case #7784, in Deschutes County, Oregon, up to and including the full sum of $5000.00; That the Oregon Automobile Insurance Company is claiming and contending that it does not cover the said Raymond Suter, nor are they required to defend him or represent him in any of the above-described actions, nor are they required to pay any of the expenses, attorneys' fees and costs in any of the actions hereinabove referred to, and are further claiming and contending that they are not responsible nor are they required to pay the judgment entered in Deschutes County, a copy of which is hereto attached and marked plaintiff's "Exhibit C," and claiming and contending that their insurance policy, "Exhibit B," does not, in any way, apply to or cover the said Raymond Suter.

XIX.

That this plaintiff claims and contends that the

said Raymond Suter is and was fully covered by the insurance policy made, executed and delivered by the Oregon Automobile Insurance Company to the defendants Houk Motor Company and Redmond Motor Company, and it is liable to this plaintiff for all costs heretofore paid by the plaintiff in defense of the said Raymond Suter in the said actions in Marion and Deschutes Counties, and that the said Oregon Automobile Insurance Company, under and by virtue of the terms of its insurance policy, are required to and should accept coverage, represent and defend the said Raymond Suter in the action now pending in the state of Oregon for the County of Deschutes, brought by William Morris against Raymond Suter, and others.

XX.

That the plaintiff and the defendant, Oregon Automobile Insurance Company, are each claiming and contending that the policy of insurance issued by it does not cover nor insure Raymond Suter in the actions hereinabove particularly described; that this plaintiff particularly contends that there is no liability whatsoever on its part, and that at the time and place of the accident its liability was suspended, and that there was no coverage extended to the defendant, Raymond Suter, due to the extended coverage afforded him by the policy of insurance made and executed to the Houk Motor Company and Redmond Motor Company as set forth in "Exhibit" hereto attached.

XXI.

That the plaintiff further claims and contends that under the terms of its policy, it is not required to defend the said Raymond Suter in the action hereinabove described brought by William Morris in the County of Deschutes, State of Oregon, against the said Raymond Suter, and others, nor has it any time insured Raymond Suter for this accident.

XXII.

This plaintiff further claims and contends that the Oregon Automobile Insurance Company is liable and indebted to it for the moneys heretofore expended by this plaintiff in defense of the said Raymond Suter, and that the said Oregon Automobile Insurance Company is indebted to this plaintiff in the full sum of $745.83.

XXIII.

That Beulah Morris has now levied an execution against the said defendant, Raymond Suter, and is further threatening to garnish this plaintiff by virtue of statutes of Oregon and is threatening to certify the said judgment to the Secretary of State and cancel the driver's license of the said Raymond Suter, and that said plaintiff has received a demand to defend said Raymond Suter in an action brought by Beulah Morris against Raymond Suter, and others, and the said Beulah Morris is further demanding that this plaintiff pay its full $5000.00 on the judgment hereinabove described.

XXIV.

That by the terms of the Federal Declaratory Judgment Act, Section 274-D (Judicial Court), signed June 14, 1934, the Courts of the United States have been invested with power to declare the rights and other legal relations of each, every and all of these parties and that the above Court has jurisdiction of this suit.

XXV.

That by virtue of the claims and contentions of the parties herein and the demands and threats made on and against this plaintiff, the plaintiff will be subject to untold peril and expense, if it is called upon to act arbitrarily in this matter, and it does specifically allege that there are at present justiciable controversies between the plaintiff company and each, every and all of the defendants, each of whose rights should be fully declared and adjudicated as the final rights of each and all of the said parties.

XXVI.

That the above Honorable Court should issue an Order staying the action of William Morris vs. Raymond Suter, and others, until such time as a declaration may be entered herein, determining the rights of these parties and determining whether this plaintiff or the Oregon Automobile Insurance Company is required to defend the said Raymond Suter, and should issue a further Order staying execution under the judgment heretofore entered in the County of Deschutes, State of Oregon, hereto

attached and marked, "Exhibit C," until such time as the rights of these parties are declared and determined.

Wherefore, the plaintiff prays that a declaratory judgment and decree be entered in this cause as follows:

1. That the court determine and adjudge that the policy of insurance issued by the United States Fidelity & Guaranty Company, "Exhibit A," does not insure nor cover the said Raymond Suter in any of the actions arising out of the collision referred to in this cause.

2. That this court declare, determine and adjudge that there is no liability whatsoever on the part of this plaintiff to any of the defendants hereinabove named.

3. That this court declare and determine that this plaintiff is not required to represent and defend said Raymond Suter in the action brought in Deschutes County, Oregon, by William Morris.

4. That these defendants, and each of them, be forever restrained and enjoined from bringing any action, suit or claim against this plaintiff by virtue of its insurance policy issued by it to the said Raymond Suter.

5. That this court adjudge, declare and decree that the Oregon Automobile Insurance Company is liable to this plaintiff in the full sum of $745.83 heretofore expended by it in defense of the said Raymond Suter.

6. That the rights and liabilities of each, every and all of the defendants be determined as to them, and each of them, in respect to the said insurance policy made and executed by this plaintiff, and for such other and further relief as to this court may seem meet, equitable and just.

/s/ W. K. PHILLIPS,
Attorney for the Plaintiff.

"EXHIBIT A"

UNITED STATES FIDELITY AND GUARANTY COMPANY

BALTIMORE MARYLAND

(A Stock Insurance Company)

AUTOMOBILE LIABILITY POLICY

DECLARATIONS

Item 1. Name of Insured Ray E. Suter and/or Lela Suter

Address (No. Street) Redmond (Town) Deschutes (County) Oregon (State)

The automobile will be principally garaged in the above town, county and state, unless otherwise stated herein No exceptions

Occupation of the Named Insured is Owner - Suter's Drive-In

Item 2. Policy Period: From June 4, 1949 to June 4, 1950

12:01 A. M., standard time at the address of the Named Insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

COVERAGES	LIMITS OF LIABILITY		PREMIUMS
A. Bodily Injury Liability	$ 5,000.00 $ 10,000.00	each person each accident	1. $ 17.00 2. $
B. Property Damage Liability	$ 5,000.00	each accident	1. $ 13.50 2. $
C. Medical Payments	$ 500.00	each person	1. $ 4.00 2. $
			1. $ 2. $
		Total Premium	$ 34.50

Item 4. Description of the automobile.

	TRADE NAME	BODY TYPE; TRUCK SIZE; TANK GALLONAGE CAPACITY; OR BUS SEATING CAPACITY	SERIAL OR MOTOR NUMBER	YEAR OF MODEL	MODEL
1.	Plymouth	Club Coupe	S. 25085844 M. P18-138404	1949	DeLuxe
2.			S. M.		

Item 5. The automobile will be used for "Pleasure and Business" if of the private passenger type and "Commercial" if of the commercial type, unless otherwise stated herein:

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the Named Insured as stated in Item 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

Item 6. (a) Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the Named Insured is the sole owner of the automobile except as herein stated: No exceptions

Countersigned by

Authorized Representative.

UTOMOBILE LIABILITY POI Y

d States Fidelity and Guaranty Company (herein called the Company) agrees with the Insured, named in the declarations part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

age A—Bodily Injury Liability

pay on behalf of the Insured all sums which the Insured shall e legally obligated to pay as damages because of bodily injury, ss or disease, including death at any time resulting therefrom, ed by any person, caused by accident and arising out of the ship, maintenance or use of the automobile.

age B—Property Damage Liability

pay on behalf of the Insured all sums which the Insured shall e legally obligated to pay as damages because of injury to or ction of property, including the loss of use thereof, caused by nt and arising out of the ownership, maintenance or use of the obile.

age C—Medical Payments

pay all reasonable expenses incurred within one year from te of accident for necessary medical, surgical, ambulance, hos- professional nursing and funeral services, to or for each person ustains bodily injury, sickness or disease, caused by accident, in or upon, entering or alighting from the automobile if the obile is being used by the Named Insured or with his permis-

nse, Settlement, Supplementary Payments

respects the insurance afforded by the other terms of this policy Coverages A and B the Company shall:

lefend any suit against the Insured alleging such injury, sick- ess, disease or destruction and seeking damages on account hereof, even if such suit is groundless, false or fraudulent; but he Company may make such investigation, negotiation and set- lement of any claim or suit as it deems expedient;

pay all premiums on bonds to release attachments for an amount ot in excess of the applicable limit of liability of this policy, ll premiums on appeal bonds required in any such defended uit, the cost of bail bonds required of the Insured in the event f accident or traffic law violation during the policy period, not o exceed the usual charges of surety companies nor $100 per ail bond, but without any obligation to apply for or furnish any uch bonds;

pay all expenses incurred by the Company, all costs taxed gainst the Insured in any such suit and all interest accruing fter entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;

pay expenses incurred by the Insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

reimburse the Insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

e amounts incurred under this insuring agreement, except set- nts of claims and suits, are payable by the Company in addition e applicable limit of liability of this policy.

finition of "Insured"

ith respect to the insurance for bodily injury liability and for rty damage liability the unqualified word "Insured" includes Named Insured and also includes any person while using the mobile and any person or organization legally responsible for the thereof, provided the actual use of the automobile is by the ed Insured or with his permission. The insurance with respect to person or organization other than the Named Insured does not y:

to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

utomobile Defined, Trailers, Two or More Automobiles Including utomatic Insurance

Automobile. Except where stated to the contrary, the word "automobile" means:

(1) Described Automobile—the motor vehicle or trailer described in this policy;

(2) Utility Trailer—a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;

(3) Temporary Substitute Automobile—an automobile not owned by the Named Insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the Named Insured who is the owner of the described automobile, if the Named Insured notifies the Company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the Company insures all automobiles owned by the Named Insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the Named Insured has other valid and collectible insurance. The Named Insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

(b) Semitrailer. The word "trailer" includes semitrailer.

(c) Two or More Automobiles. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability.

V Use of Other Automobiles

If the Named Insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "Insured" includes (1) such Named Insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such Named Insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the Named Insured or a member of his household other than a private chauffeur or domestic servant of the Named Insured or spouse;

(2) to any automobile while used in the business or occupation of the Named Insured or spouse except a private passenger automobile operated or occupied by such Named Insured, spouse, chauffeur or servant;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage C, unless the injury results from the operation of such other automobile by such Named Insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such Named Insured or spouse.

VI Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

(THIS SPACE FOR ATTACHMENT OF ENDORSEMENTS)

EXCLUSIONS

olicy does not apply:

under any of the Coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

under any of the Coverages, to liability assumed by the Insured under any contract or agreement;

under Coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the Insured and not covered by like insurance in the Company; or while any trailer covered by this policy is used with any automobile owned or hired by the Insured and not covered by like insurance in the Company;

(d) under Coverages A and C, to bodily injury to or sickness, disease or death of any employee of the Insured while engaged in the employment, other than domestic, of the Insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;

(e) under Coverage A, to any obligation for which the Insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under Coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the Insured;

(g) under Coverage C, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law.

CONDITIONS

ts of Liability—Coverage A

e limit of bodily injury liability stated in the declarations as cable to "each person" is the limit of the Company's liability for amages, including damages for care and loss of services, arising f bodily injury, sickness or disease, including death at any time ing therefrom, sustained by one person in any one accident; the of such liability stated in the declarations as applicable to "each ent" is, subject to the above provision respecting each person, otal limit of the Company's liability for all damages, including ges for care and loss of services, arising out of bodily injury, sickor disease, including death at any time resulting therefrom, sus- d by two or more persons in any one accident.

t of Liability—Coverage C

e limit of liability for medical payments stated in the declarations plicable to "each person" is the limit of the Company's liability l expenses incurred by or on behalf of each person who sustains y injury, sickness or disease, including death resulting therefrom, y one accident.

is of Liability

e inclusion herein of more than one Insured shall not operate to se the limits of the Company's liability.

ncial Responsibility Laws—Coverages A and B

ch insurance as is afforded by this policy for bodily injury liability operty damage liability shall comply with the provisions of the r vehicle financial responsibility law of any state or province which be applicable with respect to any such liability arising out of wnership, maintenance or use of the automobile during the policy d, to the extent of the coverage and limits of liability required ch law, but in no event in excess of the limits of liability stated s policy. The Insured agrees to reimburse the Company for any ent made by the Company which it would not have been obli- to make under the terms of this policy except for the agreement ined in this paragraph.

ult and Battery—Coverages A and B

ault and battery shall be deemed an accident unless committed at the direction of the Insured.

ce of Accident

nen an accident occurs written notice shall be given by or on l of the Insured to the Company or any of its authorized agents on as practicable. Such notice shall contain particulars sufficient ntify the Insured and also reasonably obtainable information cting the time, place and circumstances of the accident, the s and addresses of the injured and of available witnesses.

ce of Claim or Suit—Coverages A and B

claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

8. Assistance and Cooperation of the Insured—Coverages A and B

The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

9. Medical Reports; Proof and Payment of Claim—Coverage C

As soon as practicable the injured person or someone on his behalf shall give to the Company written proof of claim, under oath if required, and shall, after each request from the Company, execute authorization to enable the Company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the Company when and as often as the Company may reasonably require.

The Company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the Insured or, except hereunder, of the Company.

10. Action Against Company—Coverages A and B

No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve the Company of any of its obligations hereunder.

11. Action Against Company—Coverage C

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the Company.

12. Other Insurance—Coverages A and B

If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater

(Continued on Reverse Side)

tion of such loss than the applicable limit of liability stated in clarations bears to the total applicable limit of liability of all nd collectible insurance against such loss: provided, however, urance with respect to temporary substitute automobiles un- suring Agreement IV or other automobiles under Insuring ent V shall be excess insurance over any other valid and col- insurance available to the Insured, either as an Insured under y applicable with respect to said automobiles or otherwise.

Insurance—Coverage C

insurance afforded with respect to other automobiles under g Agreement V shall be excess insurance over any other valid lectible medical payments insurance applicable thereto.

gation—Coverages A and B

e event of any payment under this policy, the Company shall ogated to all the Insured's rights of recovery therefor against son or organization and the Insured shall execute and deliver ents and papers and do whatever else is necessary to secure hts. The Insured shall do nothing after loss to prejudice such

ges

ce to any agent or knowledge possessed by any agent or by any erson shall not effect a waiver or a change in any part of this r estop the Company from asserting any right under the terms olicy; nor shall the terms of this policy be waived or changed, by endorsement issued to form a part of this policy.

nment

nment of interest undee this policy shall not bind the Com- ntil its consent is endorsed hereon: if, however, the Named shall die or be adjudged bankrupt or insolvent within the eriod, this policy, unless canceled, shall, if written notice be the Company within sixty days after the date of such death or adjudication, cover (1) the Named Insured's legal representative as the Named Insured, and (2) under Coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having propee temporary custody of the automobile, as an Insured, and under Coverage C while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

17. Cancelation

This policy may be canceled by the Named Insured by mailing to the Company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the Company by mailing to the Named Insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the Named Insured or by the Company shall be equivalent to mailing.

If the Named Insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The Company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the Named Insured.

18. Declarations

By acceptance of this policy the Named Insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

Witness Whereof, the United States Fidelity and Guaranty Company has caused this policy to be signed by its President and ry at Baltimore, Maryland, and countersigned by a duly authorized representative.

DUPLICATE

~~SPECIMEN~~ COPY

Automobile
Liability Policy

No. NA 556225

Issued To

Ray E. Suter and/or Lela Suter

Expires June 4, 1950

at Twelve and One Minute O'Clock A. M.

U. S. F. & G.

UNITED STATES FIDELITY
and GUARANTY COMPANY
BALTIMORE 3, MARYLAND

15

Attached to Liability Policy

United States Fidelity and Guaranty Company
Baltimore, Maryland

Private Passenger Automobile Classifications
(Rating Information)

On the basis of the company's information when the policy is written, the automobile is classified A-1, A-2 or A-3, as evidenced by whichever of such symbols is shown together with the trade name of the automobile in the declarations.

Class A-1 means

1. use of the automobile is not required by or customarily involved in the occupational duties of any person except in going to and from the principal place of occupation;

2. there is no operator of the automobile under 25 years of age resident in the named insured's household or employed as a chauffeur of the automobile, and

3. the estimated mileage of the automobile, including any replacement thereof, during the next twelve months is not over 7500 miles.

Class A-2 means

1. use of the automobile is not required by or customarily involved in the occupational duties of any person except in going to and from the principal place of occupation, and

2. there is no operator of the automobile under

25 years of age resident in the named insured's household or employed as a chauffeur of the automobile.

Class A-3 means

use of the automobile is not required by or customarily involved in the occupational duties of any person except in going to and from the principal place of occupation.

Automobiles Owned by Farmers or Clergymen—Provisions with respect to the use of the automobile in occupational duties do not apply to automobiles owned by farmers or clergymen.

"EXHIBIT B"

Policy insured Houk Motor Company, Redmond Motor Company and Redmond Tractor Company, from October 1, 1949, to October 1, 1950, Limits $100,000.00

Other coverage: Blanket insurance
Property damage and collision
Cargo Liability and towing

During the life of the policy, automobiles will not be used as public or livery conveyance, towing or propelling trailers or other vehicles except trailers used for personal, pleasure or family purposes being used with an automobile of private passenger type; however, this exclusion shall apply to trailer homes and trailers used for business purposes, other than a trailer of a passenger type.

Under the blanket basis, the policy does not apply:

A. Unless the use of the automobile is with the permission of the named insured.

B. To any automobile owned by the insured or by a member of his family other than the named insured.

C. With respect to the injury to or death of any person who is named insured.

D. To any employee with respect to injury or death of another employee of the same employer injured in the course of such employment. The insurance applies to any other person or organization provided the insurance applies only if the named insured's operation is classified as automobile dealer or repair shop and only with respect to the use, for such business operations or for pleasure purposes of any automobile covered under such classification.

Under Title: "Additional Insured" the policy reads:

"The insurance granted by clauses E and F shall in the same manner and under the same conditions, declarations and exclusions as to the insured, apply to any person while legally operating any automobile described in the schedule of warranties with the permission of the assured, and also to any persom, firm or corporation legally responsible for the use thereof, provided the declared and actual use of the automobile is business and pleasure or commercial, each as defined herein, and provided

further that the actual use is with the permission of the named assured, provided that any additional assured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy; provided further that in the event the insured or additional insured suffer bodily injury or death, or damage to property through the act or omission of any other person occupying or operating said automobile, such person shall not be an additional assured within the terms of this policy; provided further that in the event a person who would otherwise be an additional assured by reason of having been given permission to operate the car, shall permit another to operate the car, neither party shall be an additional assured or be entitled to coverage under this policy. The insurance herein granted such additional assured shall be subject to all the conditions, declarations and exclusions of this policy, and said condition, declarations and exclusions shall apply to and be binding upon the additional assured in the same manner and with the same effect as to and upon the assured and it shall be the duty of the additional assured to comply with and perform all the conditions and requirements of this policy. If an automobile covered by this policy is sold or transferred, the indemnity provided herein shall not extend to such purchaser or transferee, unless the interest in the policy is as-

signed in accordance with all the conditions relating to the manner of such transfer.

"This company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy."

"EXHIBIT C"

In the Circuit Court of the State of Oregon for the County of Deschutes

No. 7784

BEULAH MORRIS,

Plaintiff,

vs.

RAYMOND SUTER, HOUK MOTOR COMPANY, a Corporation, and JAMES STUCHLIK,

Defendants.

JUDGMENT

The above-entitled matter came on regularly for trial before a jury in the Court of the Honorable Judge Ralph Hamilton on the 20th day of November, 1950, at which time the plaintiff appeared in person and by and through her attorneys Duane Vergeer and Harry F. Samuels; defendant Raymond Suter appeared in person and by and through his attorneys, George Brewster and Bruce Spaulding; Houk Motor Company, a corporation, ap-

peared by and through its attorney George Brewster; and James Stuchlik appeared in person and by and through his attorney Bruce Spaulding; a jury was duly and regularly empanelled and sworn to well and truly try the above-entitled cause, opening statements were made by counsel for plaintiff and defendants James Stuchlik, and Houk Motor Company, and defendant Raymond Suter waived his opening statement; evidence was produced by the plaintiff in support of the allegations of her complaint and the plaintiff moved for an order of voluntary non-suit as to defendant Houk Motor Company, which said order was granted by the Court, and plaintiff then rested, and defendant James Stuchlik moved for an order of involuntary non-suit which was granted by the Court; evidence was then produced by defendant Raymond Suter, and said defendant having rested, closing arguments were had by respective counsel, the jury was instructed as to the law of the case and thereupon retired to deliberate upon its verdict, and after due deliberation returned into Court its verdict, title and venue omitted, as follows:

> "We, the jury duly empanelled to well and truly try the above-entitled cause, hereby find our verdict in favor of the plaintiff, Beulah Morris, and against defendant Raymond Suter, and assess plaintiff's damages in the sum of $7,360.00.
>
> /s/ WAYNE GADDIS,
> Foreman.

and plaintiff having moved for judgment based thereon,

It Is Hereby Ordered and Adjudged that judgment be and hereby is entered herein in favor of the plaintiff and against defendant Raymond Suter, in the sum of $7,360.00, and

It Is Further Ordered and Adjudged that plaintiff be and hereby is awarded judgment against the defendant for plaintiff's costs and disbursements herein, taxed and allowed in the sum of $.....

Dated this.....day of November, 1950.

RALPH HAMILTON,
Judge.

[Endorsed]: Filed January 12, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS OREGON AUTOMOBILE INS. CO., HOUK MOTOR COMPANY and REDMOND MOTOR CO.

Come now the defendants, Oregon Automobile Insurance Co., Houk Motor Company and Redmond Motor Company, and each of them, and for answer to plaintiff's petition for a declaratory judgment, admit, deny and allege as follows:

I.

Admit paragraph I of said petition.

II.

Admit paragraph II of said petition.

III.

Admit paragraph III of said petition.

IV.

Admit paragraph IV of said petition.

V.

Admit paragraph V of said petition.

VI.

Admit that the limits of liability in said policy are as shown by said Exhibit A, and except as herein admitted, deny the remainder of paragraph VI.

VII.

For answer to paragraph VII of said petition, admit that the defendant Oregon Automobile Insurance Co., a corporation of the State of Oregon, carrying on an insurance business in said State, at all times herein mentioned, had in full force and effect, a certain policy of insurance, which insured Houk Motor Company, Redmond Motor Company and Redmond Tractor Company for the period from October 1, 1949, to October 1, 1950, subject to all of the terms, provisions and conditions in said policy contained, and except as herein admitted, defendants deny the remainder of said paragraph VII, and particularly deny that said Exhibit B to said petition is a true or correct copy of said policy of insurance.

VIII.

For answer to paragraph VIII, admit that on or about the 15th day of October, 1949, the defendant Raymond Suter, was driving a certain Mercury automobile belonging to the defendant Redmond Motor Company, with the knowledge and consent of said defendant, Redmond Motor Company, and except as herein admitted, deny the remainder of said paragraph VIII.

IX.

For answer to paragraph IX thereof, admit that on or about the 15th day of October, 1949, while defendant Raymond Suter was driving said Mercury automobile, a collision occurred between said automobile and an automobile in which Beulah Morris was a passenger, as a result of which said Beulah Morris sustained certain personal injuries. Except as herein admitted, defendants deny the remainder of paragraph IX.

X.

Admit the allegations of paragraph X of said petition, except that defendants deny that said cause was numbered 7780, and in that connection allege that the cause was numbered 7784 in the Circuit Court of the State of Oregon for the county of Deschutes.

XI.

These defendants have no information as to the present status of said judgment, and therefore deny the allegations of paragraph XI of said petition.

XII.

Admit the allegations of paragraph XII of said petition.

XIII.

For answer to paragraph XIII thereof, admit that the United States Fidelity and Guaranty Company made demand upon the Oregon Automobile Insurance Company to defend the said Raymond Suter in said two actions, but deny the remainder of said paragraph, and particularly deny that said demand was adequate or timely.

XIV.

For answer to paragraph XIV thereof, defendants admit that William Morris, the driver and operator of the automobile in which Beulah Morris was riding at the time of said collision, has brought an action in the Circuit Court of the State of Oregon for the County of Deschutes, against Raymond Suter, Redmond Motor Company and James Stuchlik, for the total sum of $9,250.00; that plaintiff herein has purported to tender to defendant Oregon Automobile Insurance Company the defense of said action on behalf of defendant Raymond Suter, and except as herein admitted, defendants deny the remainder of said paragraph XIV.

XV.

For answer to paragraph XV thereof, defendants admit that the Oregon Automobile Insurance Company has refused to defend said Raymond Suter in either of the actions brought by Beulah Morris, ad-

mit that the plaintiff herein did employ attorneys to represent the said Raymond Suter in the action brought in Marion County, admit that said cause of action in Marion County was abandoned, and except as herein admitted, deny the remainder of said paragraph XV.

XVI.

For answer to paragraph XVI thereof, defendants admit that plaintiff herein did employ an attorney to represent said Raymond Suter in the action brought by Beulah Morris in Deschutes County, and except as herein admitted, deny the remainder of said paragraph XVI.

XVII.

For answer to paragraph XVII thereof, defendants admit that plaintiff will be required to employ attorneys to defend the said Raymond Suter in the action brought by William Morris in Deschutes County, and except as herein admitted, deny the remainder of said paragraph XVII.

XVIII.

For answer to paragraph XVIII thereof, defendants admit that the defendants Raymond Suter and Oregon Automobile Insurance Company now contend that plaintiff herein is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance;

have no knowledge as to what defendants William Morris and Beulah Morris may be contending in that regard; admit that defendants William Morris, Beulah Morris, Raymond Suter and Oregon Automobile Insurance Company now contend that plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784, in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy; admit that the defendant Oregon Automobile Insurance Company contends that: (a) As to the action brought by Beulah Morris in Marion County, its policy does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company is under no obligation whatsoever with respect to his defense; (b) that with respect to the action brought in Deschutes County by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to payment of said judgment against said Raymond Suter until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance, but defendant, Oregon Automobile Insurance Company admits that after plaintiff herein has applied toward satisfaction of said judgment the limits of its said policy of insurance, defendant Oregon Automobile Insurance Company will then be obligated according to the terms and conditions of its policy with respect to the balance of said judgment then

remaining unsatisfied; (c) that with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company is not obligated under its policy of insurance with respect to the cause of action for personal injuries to said William Morris or the cause of action for property damage of said William Morris, but with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris, defendant Oregon Automobile Insurance Company admits that after plaintiff herein has exhausted the limits of liability under its said policy of insurance, then defendant Oregon Automobile Insurance Company will be obligated under the terms and provisions of its policy with respect to said cause of action for loss of consortium. Except as herein admitted defendants deny the remainder of said paragraph XVIII.

XIX.

With respect to paragraph XIX thereof, defendants admit that plaintiff now makes the contentions therein set forth, but except as herein admitted, defendants deny the remainder of said paragraph XIX.

XX.

For answer to paragraph XX thereof, defendants admit that plaintiff now makes the contentions therein set forth, admit that defendant Oregon Automobile Insurance Company makes the contentions above set forth in paragraph XVIII hereof, and except as herein admitted, deny the remainder of said paragraph XX.

XXI.

For answer to paragraph XXI thereof, defendants admit that plaintiff now makes the contentions therein set forth, and deny the remainder of said paragraph XXI.

XXII.

For answer to paragraph XXII thereof, defendants admit that plaintiff now makes the contentions therein set forth, but deny the remainder of said paragraph XXII.

XXIII.

For answer to paragraph XXIII thereof, defendants admit that plaintiff has received a demand to defend said Raymond Suter in an action brought by Beulah Morris against Raymond Suter and others, admit that said Beulah Morris is demanding that plaintiff herein pay its full policy limits on the judgment in her favor rendered in said action in Deschutes County, and defendants have no knowledge or information sufficient to form a belief as to the remainder of said paragraph XXIII, and therefore deny the same.

XXIV.

Admit the allegations of paragraph XXIV thereof.

XXV.

Deny the allegations of paragraph XXV thereof.

XXVI.

For answer to paragraph XXVI thereof, defendants consent that an order may be entered herein

staying the action of William Morris against Raymond Suter and others, and that an order may be issued staying execution under the judgment heretofore entered in the action brought by Beulah Morris in the County of Deschutes.

Wherefore having fully answered plaintiff's petition, defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company pray that plaintiff have no relief as against these defendants.

/s/ RANDALL B. KESTER,
Attorney for Defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 1, 1951.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT OF DEFENDANTS WILLIAM MORRIS AND BEULAH MORRIS

Comes now the defendants, William Morris and Beulah Morris above named, and by way of answer to plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

Answering Paragraph I of plaintiff's complaint, these defendants admit the allegations therein contained.

II.

Answering Paragraph II of plaintiff's complaint, these defendants admit the allegations therein contained.

III.

Answering Paragraph III of plaintiff's complaint, these defendants admit the allegations therein contained.

IV.

Answering Paragraph IV of plaintiff's complaint, these defendants admit the allegations therein contained.

V.

Answering Paragraph V of plaintiff's complaint, defendants admit that the plaintiff for a good and valuable consideration paid to it by Raymond Suter, did make, execute and deliver to him a certain policy of insurance, which was in full force and effect on the 15th day of October, 1949; plaintiff's allege that they do not have information as to the exact contents or provisions of the said insurance policy.

VI.

Answering Paragraph VI of plaintiff's complaint, these defendants allege that they do not have any information as to the amount of coverage as set forth in said Paragraph VI in the complaint.

VII.

Answering Paragraph VII of plaintiff's complaint, these defendants admit the defendant, Oregon Automobile Insurance Company, a corporation

of the State of Oregon, was carrying on an insurance business on the 15th day of October, 1949, and prior to said time and had for a good and valuable consideration, made, executed and delivered to Houk Motor Company and Redmond Motor Company a certain policy of liability insurance, the exact provisions and contents unknown to these defendants, which was in full force and effect at the time of the collision described in the complaint, which policy covered the operation of the Mercury automobile driven by defendant, Raymond Suter, and which protected his legal liability for damages arising from the operation of the said vehicle.

VIII.

Answering Paragraph VIII of plaintiff's complaint, these defendants admit the allegations therein contained.

IX.

Answering Paragraph IX of plaintiff's complaint, these defendants admit the allegations therein contained.

X.

Answering Paragraph X of plaintiff's complaint, these defendants admit the allegations therein contained.

XI.

Answering Paragraph XI of plaintiff's complaint, these defendants admit the allegations therein contained.

XII.

Answering Paragraph XII of plaintiff's com-

plaint, these defendants admit the allegations therein contained.

XIII.

Answering Paragraph XIII of plaintiff's complaint, these defendants allege that they do not have sufficient information so as to form a belief as to the truth or falsity of the allegations therein contained and are therefore unable to answer the same, and therefore deny the allegations contained in said paragraph.

XIV.

Answering Paragraph XIV of the plaintiff's complaint, these defendants admit the allegations therein contained.

XV.

Answering Paragraph XV of plaintiff's complaint, these defendants admit the allegations therein contained.

XVI.

Answering Paragraph XVI of plaintiff's complaint, these defendants allege that do not have sufficient information so as to form a belief as to the truth or falsity of the allegations therein contained, and therefore deny the contents of said paragraph.

XVII.

Answering Paragraph XVII of plaintiff's complaint, these defendants allege that they do not have sufficient information so as to form a belief as to the truth or falsity of the allegations therein contained and therefore deny the contents of said paragraph.

XVIII.

Answering Paragraph XVIII of plaintiff's complaint, these defendants admit that they are contending that the plaintiff, United States Fidelity and Guaranty Company under and by virtue of its insurance policy, should accept liability and partially satisfy the judgment obtained in the Circuit Court of the State of Oregon for Deschutes County by Beulah Morris, and admit that the Oregon Automobile Insurance Company is claiming that it does not cover the said Raymond Suter for liability coverage by virtue of its said policy, and that the said Oregon Automobile Insurance Company is claiming and contending that it is not required to defend the said Raymond Suter or to pay any expenses or attorneys' fees and costs incidental thereto, and that the said Oregon Automobile Insurance Company is claiming that it is not responsible for payment of the judgment entered in Deschutes County, Oregon, in favor of Beulah Morris and against defendant, Raymond Suter, and that the said Company is claiming that its policy does not cover the said Raymond Suter, and defendants allege that they do not have sufficient information so as to form a belief as to the truth or falsity of the other allegations in said paragraph contained, and therefore, deny the balance of said paragraph.

XIX.

Answering Paragraph XIX of plaintiff's complaint, these defendants admit the allegations therein contained.

XX.

Answering Paragraph XX of plaintiff's complaint, these defendants allegations therein contained.

XXI.

Answering Paragraph XXI of plaintiff's complaint, these defendants admit the allegations therein contained.

XXII.

Answering Paragraph XXII of plaintiff's complaint, these defendants admit the allegations therein contained.

XXIII.

Answering Paragraph XXIII of plaintiff's complaint, these defendants admit the allegations therein contained.

XXIV.

Answering Paragraph XXIV of plaintiff's complaint, these defendants admit the allegations therein contained.

XXV.

Answering Paragraph XXV of plaintiff's complaint, these defendants admit the allegations therein contained.

XXVI.

Answering Paragraph XXVI of plaintiff's complaint, these defendants deny the allegations therein contained and the whole of said paragraph.

And by Way of a Further and Separate Answer Herein, and by Way of Cross-Complaint, defendant Beulah Morris complains and alleges as follows:

I.

That at all times herein mentioned, United States Fidelity & Guaranty Company is and was a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, and had qualified and was doing business in the State of Oregon and elsewhere, as an insurance company.

II.

That the defendants, Oregon Automobile Insurance Company, Raymond Suter, Houk Motor Company and Redmond Motor Company are residents of the State of Oregon.

III.

That the defendants, Beulah Morris and William Morris are residents of the State of Washington.

IV.

That this controversy involves an amount over and above the sum of $3000.00, exclusive of interest, costs and attorneys' fees.

V.

That at all times herein mentioned, the plaintiff, the United States Fidelity and Guaranty Company, a corporation, for a good and valuable consideration paid to it by Raymond Suter had made, executed and delivered to the said Raymond Suter, a

certain policy of insurance covering a certain Plymouth Club Coupe automobile; that said policy was in full force and effect at all times herein mentioned, which provided that in the event that Raymond Suter was operating his automobile or another automobile and became involved in an accident, that the said insurance company would protect his legal liability for damages resulting therefrom in the amount of not less than $5,000.00 for one injury or claim for personal injury, provided that the said Raymond Suter should be legally liable therefor.

VI.

That the defendant, Oregon Automobile Insurance Company, a Corporation, of the State of Oregon, carrying on an insurance business had for a valuable consideration, made, executed and delivered and issued to Houk Motor Company and Redmond Motor Company, a certain policy of liability insurance, which was in full force and effect at all times herein mentioned and which provided that it would protect the legal liability of Houk Motor Company and Redmond Motor Company and all other persons using any vehicles owned by the said companies with the permission of the said Houk Motor Company and/or Redmond Motor Company for legal liability for personal injuries of the one person in the amount of not less than $100,000.00.

VII.

That on or about the 15th day of October, 1949, the defendant, Raymond Suter, at the request of

and with the full permission and knowledge of defendants, Houk Motor Company and Redmond Motor Company, was driving and operating a certain Mercury automobile, belonging to the said defendant, Houk Motor Company and/or Redmond Motor Company, bearing dealer's license # A 75.

VIII.

That on or about the 15th day of October, 1949, while so driving the said Mercury automobile, the defendant, Raymond Suter, did run into and collide with an automobile, being driven on U. S. Highway # 97, in which Beulah Morris was riding as a passenger, in such a way and manner that the said Beulah Morris did receive certain personal injuries.

IX.

That thereafter the said Beulah Morris did bring an action at law for personal injuries in the County of Deschutes, Oregon, commonly known as case # 7780, in which she named Raymond Suter, Houk Motor Company, a corporation, and James Stuchlik as defendants; that thereafter and on about the 20th day of November, 1950, the said case was tried in Deschutes County resulting in a verdict and judgment against the defendant, Raymond Suter, in the sum of $7,360.00, a copy of which judgment as entered in Deschutes County, is hereto attached and marked the plaintiff's "Exhibit C," and by reference is made a part and parcel of this petition as though fully and completely set forth and plead at this place.

X.

That the said judgment is now in full force and effect, has not been appealed from and has not been satisfied, and that the full amount thereof, together with interests and costs of the said trial, taxed and allowed in the sum of $114.83, is due and payable.

XI.

That subsequent to the time of the collision referred to herein which occurred on the 15th day of October, 1949, involving the said Beulah Morris and a car driven by defendant, Raymond Suter, and prior to the time that the action of Beulah Morris was filed in the Circuit Court of Deschutes County, said Oregon Automobile Insurance Company, a corporation, stated that it would accept coverage on behalf of defendant Raymond Suter, and would pay and settle the said claim of Beulah Morris, as well as the claim of William Morris; that subsequent to the time that the action of Beulah Morris was filed in the Circuit Court of the State of Oregon for the County of Deschutes, the said Oregon Automobile Insurance Company did employ an attorney to represent the said Raymond Suter and the said Oregon Automobile Insurance Company in the defense of the action brought by Beulah Morris; that during the pendency of said suit and before the time of trial said Oregon Automobile Insurance Company did represent that it would accept coverage on behalf of defendant, Raymond Suter, and would pay and settle the claim of Beulah Morris and by reason of said representa-

tions the plaintiff, United States Fidelity & Guaranty Company and defendant, William Morris, and Beulah Morris relied upon said representations were mislead and damaged, and defendant Beulah Morris, hereby contends that Oregon Automobile Insurance Company, a corporation, should be forever estopped from denying coverage and liability under the insurance policy issued by it and formerly mentioned herein.

XII.

That judgment should be entered herein by way of cross-complaint in favor of defendant Beulah Morris, and against the defendants, Oregon Automobile Insurance Company, a corporation, and Raymond Suter, and plaintiff United States Fidelity & Guaranty Company, a corporation, for the sum of $7360.00 together with costs, taxed and allowed in the case of Beulah Morris formerly mentioned herein, in the sum of $114.83 together with interest on said judgment and costs at the rate of 6 per cent per annum from the 27th day of November, 1950.

Wherefore, these defendants pray that the complaint of the plaintiff herein be dismissed as to them, but that judgment be entered herein in favor of Beulah Morris and against the defendants Oregon Automobile Insurance Company, a corporation, and Raymond Suter, and Plaintiff United States Fidelity & Guaranty Company, a corporation, for the sum of $7360.00 together with costs, taxed and allowed in the sum of $114.83, together with interest on said judgment and costs at the rate of 6 per

cent per annum from the 27th day of November, 1950, together with costs and disbursements incurred in this suit.

VERGEER & SAMUELS,

By /s/ HARRY F. SAMUELS,
Attorneys for Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 6, 1951.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT OREGON AUTOMOBILE INSURANCE COMPANY TO CROSS-COMPLAINT OF DEFENDANT BEULAH MORRIS

Comes now the defendant Oregon Automobile Insurance Company, and for answer to the cross-complaint filed herein by defendant Beulah Morris, admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I thereof.

II.

Admits the allegations of paragraph II thereof.

III.

Admits the allegations of paragraph III thereof.

IV.

Admits the allegations of paragraph IV thereof.

V.

Admits the allegations of paragraph V thereof.

VI.

For answer to paragraph VI thereof, admits that the defendant Oregon Automobile Insurance Company, a corporation of the State of Oregon, carrying on an insurance business, had for a valuable consideration, made, executed, and delivered and issued to Houk Motor Company and Redmond Motor Company a certain policy of liability insurance, which was in full force and effect at the times therein mentioned, subject to all of the terms, provisions and conditions in said policy contained, and except as herein admitted defendant denies the remainder of said paragraph VI.

VII.

For answer to paragraph VII thereof, admits that on or about the 15th day of October, 1949, the defendant Raymond Suter was driving a certain Mercury automobile belonging to the defendant Redmond Motor Company, with the knowledge and consent of said defendant, Redmond Motor Company, and except as herein admitted, denies the remainder of said paragraph VII.

VIII.

For answer to paragraph VIII thereof, admits that on or about the 15th day of October, 1949, while defendant Raymond Suter was driving said Mercury automobile a collision occurred between said automobile and an automobile in which Beulah

Morris was a passenger, as a result of which said Beulah Morris sustained certain personal injuries. Except as herein admitted, defendant denies the remainder of said paragraph VIII.

IX.

Admits the allegations of paragraph IX thereof, except that defendant denies that said cause was numbered 7780 and in that connection allege said cause was numbered 7784 in the Circuit Court of the State of Oregon for the County of Deschutes, and except that this defendant is unable to admit or deny the allegation with respect to the contents of said judgment for the reason that said judgment was not attached to said cross-complaint as an exhibit.

X.

This defendant has no information as to the present status of said judgment, and therefore denies the allegations of paragraph X thereof.

XI.

Denies the allegations of paragraph XI thereof, and each and every part thereof, and the whole thereof.

XII.

For answer to paragraph XII thereof, admits that judgment should be entered herein in favor of defendant Beulah Morris and against the plaintiff United States Fidelity & Guaranty Company up to the full amount of the limits of plaintiff's

said policy of insurance, and denies the remainder of said paragraph XII.

Wherefore, having fully answered the cross-complaint of defendant Beulah Morris, defendant Oregon Automobile Insurance Company prays that said defendant Beulah Morris take nothing as against this defendant.

/s/ RANDALL B. KESTER,
Attorney for Defendant, Oregon Automobile Insurance Co.

Service of Copy acknowledged.

[Endorsed]: Filed February 8, 1951.

[Title of District Court and Cause.]

ORDER

February 19, 1951.

Plaintiff appearing by Mr. W. K. Phillips, of counsel, and the defendants by Mr. Randall B. Kester and Mr. Harry Samuels, of counsel.

It Is Ordered that this cause be, and is hereby set for pre-trial conference and trial Monday, March 19, 1951.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter having come on regularly for pretrial conference pursuant to the rules of the above-entitled court, the Honorable Gus J. Solomon presiding: The plaintiff appearing by its attorney W. K. Phillips; the defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company appearing by their attorney Randall B. Kester; the defendants William Morris and Beulah Morris appearing by their attorney Harry Samuels, and the parties having agreed upon the following facts and issues;

It is, based upon the said agreement and stipulation, Ordered that the agreed facts, contentions and issues be and they are hereby deemed to be as follows in this cause.

Agreed Facts

I.

That at all times herein mentioned the United States Fidelity and Guaranty Company is and was a corporation organized and existing under and by virtue of the laws of the state of Maryland, and had qualified and was doing business in the state of Oregon as an insurance company.

II.

That the defendant Oregon Automobile Insurance Company is and was at all times herein mentioned an Oregon corporation, qualified to and carrying on an insurance business within the state of Oregon.

III.

That the defendants Houk Motor Company and Redmond Motor Company were at all times herein mentioned corporations of the state of Oregon and each such corporation was carrying on an automobile sales agency and garage within the state of Oregon.

IV.

That the defendants Beulah Morris and William Morris are residents and inhabitants of the state of Washington, and are husband and wife.

V.

That the amount in controversy exceeds the sum of $3000.00, exclusive of interest, costs and attorneys' fees.

VI.

That at all times herein mentioned the United States Fidelity and Guaranty Company had in full force and effect a certain policy of insurance which insured the defendant Raymond Suter for the period from June 4, 1949, to June 4, 1950. A copy of said policy is hereinafter identified as Pre-Trial Exhibit No. 1, and by this reference the same is incorporated herein.

VII.

That at all times herein mentioned the Oregon Automobile Insurance Company had in full force and effect a certain policy of insurance which insured the Houk Motor Company, Redmond Motor Company and Redmond Tractor Company for the period from October 1, 1949, to October 1, 1950. A

copy of said policy is hereinafter identified as Pre-Trial Exhibit No. 2, and by this reference the same is incorporated herein.

VIII.

That on or about October 15, 1949, the defendant Raymond Suter was driving and operating a certain Mercury automobile, bearing dealer's license A 75, belonging to the defendant Redmond Motor Company, with the knowledge and consent of the Redmond Motor Company. At said time a collision occurred between the vehicle Raymond Suter was operating and an automobile in which the defendant Beulah Morris was a passenger, as a result of which said Beulah Morris received certain personal injuries.

IX.

That thereafter the said defendant Beulah Morris did bring an action at law for the said personal injuries in the Circuit Court of the State of Oregon for the County of Deschutes, commonly known as case No. 7784, in which Raymond Suter, Houk Motor Company and James Stuchlik were named as defendants; that thereafter and on or about the 20th day of November, 1950, the said cause was tried, resulting in a verdict and judgment against the defendant Raymond Suter alone, in the sum of $7,360.00, and that thereafter costs were taxed against the defendant Raymond Suter, and in favor of the plaintiff, in the sum of $114.83.

X.

That the said judgment and cost bill are now in

full force and effect and have not been paid or satisfied and are due and payable, with interest at the rate of six per cent per annum from the 27th day of November, 1950.

XI.

That the said Beulah Morris did, during the pendency of the action in the county of Deschutes hereinabove referred to, bring an action at law for damages in the County of Marion, State of Oregon, which action was entitled, "Beulah Morris v. Raymond Suter and James Stuchlik." In said Marion county action said Beulah Morris sought to recover for the same personal injuries, arising from the same accident, as alleged in said Deschutes county action. Said Marion county action was abandoned by the plaintiff therein, and an order of voluntary nonsuit was entered prior to the trial of the Deschutes county action above mentioned.

XII.

On or about ....., defendant William Morris, who was the owner and driver of the automobile in which Beulah Morris was riding at the time of said accident, commenced an action in the Circuit Court of the State of Oregon for the county of Deschutes, against Raymond Suter, Redmond Motor Company and James Stuchlik, defendants, No. ....., wherein judgment is demanded against said defendants in the following amounts: Personal injuries to William Morris, $1500.00; property damage to his automobile, $250.00; loss of

consortium by reason of the injuries to Beulah Morris, $7500.00; together with costs and disbursements. Said action is now pending.

XIII.

With respect to the action brought in Marion County by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of $223.20.

XIV.

With respect to the action brought in Deschutes county by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of $428.80, and plaintiff paid an additional sum of $97.83 as expenses.

XV.

A controversy eixsts with respect to the applicability of said policies of insurance to said actions and any liability of defendant Raymond Suter, as shown by the contentions of the parties hereinafter set forth, and as shown by the correspondence which is hereinafter identified as exhibits 11 to 19, inclusive.

Contentions of the Parties

Plaintiff contends:

I.

That under the terms of its policy it did not nor does insure the defendant Raymond Suter, except

as excess insurance, and that it has no liability to the defendants Raymond Suter, Beulah Morris, or William Morris until the defendant Oregon Automobile Insurance Company has expended the limits of its said insurance policy.

II.

That under the terms of the said insurance policy written by the Oregon Automobile Insurance Company, it is required to pay and satisfy the judgment, costs and interest rendered in favor of the defendant Beulah Morris against Raymond Suter entered in Deschutes County on or about the 27th day of November, 1950.

III.

That under the terms of its policy the Oregon Automobile Insurance Company is required to accept liability for and defend the defendant Raymond Suter in the action now pending in Deschutes County, Oregon, to wit: "William Morris vs. Raymond Suter, Redmond Motor Company and James Stuchlik."

IV.

That the defendant Oregon Automobile Insurance Company is indebted to the plaintiff in the sum of $745.83, together with interest thereon at the rate of six per cent per annum from December 1, 1950, until paid.

V.

That the plaintiff is entitled to a reasonable attorney fee in this cause and should be permitted to petition therefore at the time of entering a decree.

VI.

That the Oregon Automobile Insurance Company was obligated to accept liability for and defend Raymond Suter in the action brought by Beulah Morris in Marion County, Oregon.

VII.

That the plaintiff is not obligated to the defendants Beulah Morris, William Morris or Raymond Suter in any way.

VIII.

That the defendant Beulah Morris is not entitled to recover a reasonable attorneys' fee in this cause against the plaintiff herein.

The defendants Beulah Morris and William Morris contend:

I.

That the plaintiff and defendant Oregon Automobile Insurance Company, by virtue of their insurance policies, are required to protect the legal liability for damages caused by the negligence of the defendant Raymond Suter, to the full extent of the coverage disclosed by the said policies.

II.

That the defendant Oregon Automobile Insurance Company is estopped to deny primary coverage to Raymond Suter in the actions brought by Beulah Morris and William Morris.

III.

That the defendant Beulah Morris is entitled to

recover a reasonable attorneys' fee in this cause and should be entitled to petition therefore at the time of entering a decree herein.

Defendants Houk Motor Company, Redmond Motor Company and Oregon Automobile Insurance Company contend:

I.

That with respect to the action brought by Beulah Morris in Marion County, the policy of Oregon Automobile Insurance Company does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company was and is under no obligation whatsoever with respect to his defense, or any expense arising therefrom.

II.

That with respect to the action brought in Deschutes county by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to the expense thereof or to payment of said judgment against said Raymond Suter, costs or interest, until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance, but defendant Oregon Automobile Insurance Company admits that after plaintiff herein has applied toward satisfaction of said judgment the limits of its said policy of insurance, defendant Oregon Automobile Insurance Company will then

be obligated according to the terms and conditions of its policy with respect to the balance of said judgment then remaining unsatisfied.

III.

That with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company is not obligated under its policy of insurance as to defendant Raymond Suter with respect to the cause of action for personal injuries to said William Morris or the cause of action for property damage of said William Morris; nor with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris, until plaintiff has exhausted the limits of its policy of insurance. But defendant Oregon Automobile Insurance Company admits that after plaintiff herein has exhausted the limits of liability under its said policy of insurance, with respect to claims arising out of injuries to Beulah Morris, then defendant Oregon Automobile Insurance Company will be obligated under the terms and provisions of its policy with respect to said cause of action for loss of consortium.

IV.

That plaintiff herein is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance.

V.

That plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784, in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy.

VI.

That the defendant Oregon Automobile Insurance Company is not indebted to the plaintiff in any amount.

VII.

That the defendant Oregon Automobile Insurance Company is not indebted to defendant Beulah Morris in any amount at this time, and will not be indebted to her in any amount until plaintiff has exhausted the limits of liability of its insurance as to the judgment in her favor in Deschutes county.

VIII.

That neither the plaintiff nor the defendants Beulah Morris or William Morris are entitled to recover attorneys' fees in this cause from the Oregon Automobile Insurance Company.

IX.

That the policy of plaintiff was and is valid and collectible insurance available to and covering said Raymond Suter with respect to liability arising out of said accident, within the meaning of the policy of Oregon Automobile Insurance Company.

X.

That the policy of Oregon Automobile Insurance Company was not and is not valid and collectible insurance available to or covering said Raymond Suter with respect to liability arising out of said accident.

XI.

(a) That defendant Oregon Automobile Insurance Company is not estopped to assert the contentions herein set forth; and

(b) That any alleged estoppel cannot be used to modify the terms, provisions or conditions of the policy of Oregon Automobile Insurance Company or to extend the coverage provided therein.

Questions to Be Determined

1. Is the policy of insurance written by the United States Fidelity & Guaranty Company a primary coverage or excess to that policy written by the Oregon Automobile Insurance Company?

2. Is the Oregon Automobile Insurance Company's policy primary or excess to the one written by the United States Fidelity & Guaranty Company?

3. What are the obligations of the United States Fidelity and Guaranty Company under the terms of its policy, with respect to each of the three cases herein mentioned?

4. What are the obligations of the Oregon Automobile Insurance Company under the terms of its policy, with respect to each of the three cases herein mentioned?

5. Is either policy valid and collectible insurance within the meaning of the other policy, under the circumstances of this case?

6. Is the Oregon Automobile Insurance Company indebted to the plaintiff and if so in what amount?

7. Is either insurance company indebted to dedefendant Beulah Morris, and if so in what amounts respectively?

8. Is the defendant Beulah Morris entitled to a reasonable attorneys' fee against the Oregon Automobile Insurance Company in this cause?

9. Is the defendant Beulah Morris entitled to a reasonable attorneys' fee in this cause against the plaintiff?

10. Is the plaintiff entitled to recover a reasonable attorney's fee against the defendant Oregon Automobile Insurance Company in this cause?

11. Can estoppel be used to modify the terms, provisions or conditions of the policy of Oregon Automobile Insurance Company, or to extend the coverage provided therein?

12. If so, is the defendant Oregon Automobile Insurance Company estopped to assert any or all of its contentions herein?

Exhibits

The following exhibits were identified by the parties. All objections as to identification or authenticity are waived unless hereinafter noted, but

all objections as to competency, relevancy or materiality are reserved to the time of trial.

1. Copy of United States Fidelity & Guaranty policy covering Raymond Suter.

2. Photostatic copy of Oregon Automobile Insurance policy covering Houk Motor Company and Redmond Motor Company.

3. United States Fidelity & Guaranty "Daily" covering Raymond Suter.

4. Copy of Judgment Order entered in Deschutes County, Oregon, in favor of Beulah Morris and against the defendant Raymond Suter.

5. Copy of Cost Bill entered in Deschutes County, Oregon.

6. Copy of Complaint filed by Beulah Morris in Marion County, Oregon.

7. Copy of Affidavit and Motion for a change of venue filed by Raymond Suter.

8. Duplicate draft payable to George Brewster issued by the plaintiff as attorney fees and costs in the Deschutes County trial.

9. Duplicate draft issued by the plaintiff as attorney fees and costs to Phillips, Hodler & Sandeberg in the Marion County case.

10. Duplicate expense drafts issued by the United States Fidelity and Guaranty in the Deschutes County case.

11. Copy of letter dated September 5, 1950, written by W. K. Phillips to the Oregon Automobile Insurance Company.

12. Letter dated September 12, 1950, written by Randall B. Kester to the plaintiff United States Fidelity & Guaranty.

13. Copy of letter written by W. K. Phillips to Maguire, Shields, Morrison and Bailey dated September 20, 1950.

14. Copy of letter dated November 7, 1950, written by W. K. Phillips to Maguire, Shields, Morrison and Bailey.

15. Letter written by Randall B. Kester to Phillips, Hodler & Sandeberg dated November 9, 1950.

16. Letter addressed to Oregon Automobile Insurance Company signed by Ray E. Suter, dated November 16, 1950.

17. Copy of a letter written by Randall B. Kester to Ray Suter dated November 17, 1950.

18. Letter written by Jos. A. Boyce on behalf of United States Fidelity & Guaranty Company to Oregon Automobile Insurance Company, dated December 19, 1950.

19. Copy of letter written by Randall B. Kester to United States Fidelity & Guaranty Company, dated January 9, 1950.

20. Letter from George Brewster to Wendell K. Phillips dated September 11, 1950.

21. Letter from George Brewster to Wendell K. Phillips dated September 14, 1950.

22. Written memorandum of United States Fidelity & Guaranty Co. in regard to coverage advices by the Oregon Automobile Insurance Company.

23. Letter July 8, 1950, Geo. Brewster to U.S.F.&G.

The foregoing is the pre-trial order agreed upon at a conference between the court and counsel. It supersedes the pleadings, which are hereby amended to conform hereto. It shall not be amended except by consent, or by order of the court to prevent manifest injustice.

Done in open court at Portland, Oregon, this 19th day of March, 1951.

/s/ GUS J. SOLOMON,
U. S. District Judge.

Approved:

/s/ W. K. PHILLIPS,
Of Attorneys for Plaintiff.

/s/ HARRY F. SAMUELS,
Of Attorneys for Defendants William Morris and Beulah Morris.

/s/ RANDALL B. KESTER,
Of Attorneys for Defendants Oregon Automobile Insurance Co., Houk Motor Company and Redmond Motor Co.

[Endorsed]: Filed March 19, 1951.

ORAL OPINION

March 28, 1951

In the case of United States Fidelity and Guaranty Co., plaintiff, vs. Oregon Automobile Insurance Co., et al., defendants, Civil No. 5890, I find that the automobile liability policy issued by defendant Oregon Auto Insurance Company is the primary insurance and creates liability up to its policy limits. The policy issued by the plaintiff is excess to that of the policy written by defendant, Oregon Auto.

Defendant, Oregon Auto, is therefore liable for the payment of the Judgment recovered in the State Court by Beulah Morris against defendant, Raymond Suter, in the sum of $7,360.00 plus costs and interest.

Defendant, Oregon Auto, under its policy is likewise required to defend the action filed in the State Court by defendant, William Morris, for personal injury, property damage, and loss of consortium by reason of the injuries to his wife, Beulah Morris.

As to the other issues in the case, I will receive any evidence that the parties desire to introduce and will hear argument on Monday, April 2, 1951, at 2 p.m.

[Title of District Court and Cause.]

ORDER

March 28, 1951.

Now at this day the Court renders its opinion herein.

It Is Ordered that this cause be, and is hereby, set for further argument Monday, April 2, 1951, at two o'clock p.m.

[Title of District Court and Cause.]

PETITION FOR ATTORNEY'S FEES

Come now the defendants and cross-complainants, William Morris and Beulah Morris, and Harry F. Samuels, their attorney, and respectfully show to the Court that the defendants and cross-complainants William Morris and Beulah Morris, did heretofore employ the said Harry F. Samuels as their attorney to represent them in defending the above declaratory judgment suit brought by the United States Fidelity and Guaranty Company, a corporation, and to prosecute the cross-complaint heretofore filed herein; and respectfully show that the said Harry F. Samuels is an attorney of good standing before this bar and as attorney for William Morris and Beulah Morris, did undertake said employment, and did prepare an answer and cross-complaint heretofore filed herein, and did assist in preparing a proposed pre-trial order and did try the said suit, resulting in a decree and judgment rendered herein in favor of defendants William Morris and

Beulah Morris, upon their cross-complaint, and against the defendant Oregon Automobile Insurance Company, whereby under the terms of said judgment the sum of $7,360.00, together with interest upon the costs filed in the judgment obtained in the Circuit Court of Deschutes County, may now be collectible, together with interest thereon.

That under and by virtue of Oregon Compiled Laws Annotated, Section 101-134 and the broad equitable jurisdictions in matters of this kind and nature, the said defendants William Morris and Beulah Morris and their Attorney, Harry F. Samuels, do and hereby do petition this Court for the allowance of reasonable attorney's fees against the Oregon Automobile Insurance Company, a corporation, and petition that the said allowance of attorney's fees be made a part and parcel of the final decree and judgment of this Court to be hereinafter entered in this cause.

That due to the amount of work involved and performed by the said attorney representing these petitioners, and the importance of the litigation to these petitioners, and the amount of money involved in this matter, and the fact that these petitioners had already obtained a good and valid judgment in the Circuit Court of the State of Oregon for Deschutes County, which said judgment should have been paid by the Oregon Automobile Insurance Company, a corporation, under the terms of its insurance policy, without subjecting these petitioners to any inconvenience or expense relative to the collection of the

same, your petitioners believe, allege and respectfully urge that the sum of $1500.00 represents a reasonable sum to be allowed to them as attorney's fees herein for the defense of the action brought by the United States Fidelity and Guaranty Company, a corporation, and the prosecution of the cross-complaint herein, and respectfully petition that this amount be allowed as attorney's fees for the defense of the said action and prosecution of the said cross-complaint.

Wherefore, your petitioners respectfully pray that the above Honorable Court enter an Order directing that the defendants William Morris and Beulah Morris and Harry F. Samuels, your petitioners herein, be allowed the full sum of $1500.00 as reasonable attorney's fees herein or such other sums as the Court may deem just to be paid by the defendant Oregon Automobile Insurance Company to your petitioners.

Respectfully submitted,

/s/ HARRY F. SAMUELS,

Attorney for Defendants and Cross-Complainants William Morris and Beulah Morris.

Duly verified.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

PETITION FOR ATTORNEY'S FEES

Come now the plaintiff, United States Fidelity and Guaranty Company, a corporation, and W. K. Phillips, its attorney, and respectfully shows to the court that the United States Fidelity and Guaranty Company did heretofore employ W. K. Phillips as its attorney to represent it in bringing a declaratory judgment suit in the above-entitled court for the purpose of enforcing a certain policy of insurance made and executed by the defendant, Oregon Automobile Insurance Company, and that the said W. K. Phillips, an attorney of good standing before this bar, did as the attorney for the plaintiff herein, undertake said employment and did prepare each, every and all pleadings in the above-entitled suit and did prepare a proposed pre-trial order, did try the said suit resulting in a decree and judgment rendered against the defendant, Oregon Automobile Insurance Company, upholding the contentions of this plaintiff.

That under and by virtue of Oregon Compiled Laws Annotated, Section 101-134 and the broad equitable jurisdiction in matters of this kind and nature, the said plaintiff, United States Fidelity & Guaranty Company, and its attorney, W. K. Phillips, do and do hereby petition this court for the allowance of reasonable attorney's fees against the Oregon Automobile Insurance Company, and that the said allowance of attorney's fees be made a part

and parcel of the final decree and judgment of this court to be hereinafter entered in this cause.

That due to the amount of work involved and importance of the litigation and the result obtained, your petitioners believe and respectfully urge that the sum of $1,500.00 be allowed as attorney's fees herein for the prosecution of the above suit.

Wherefore, your petitioners respectfully pray that the above honorable court enter an order directing that the plaintiff and W. K. Phillips, your petitioners, be allowed the full sum of $1,500.00 as reasonable attorney's fees herein, or such other sum as the court may deem just to be paid by the defendant, Oregon Automobile Insurance Company, to your petitioners.

Respectfully submitted,

/s/ W. K. PHILLIPS,
Attorney for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed March 30, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The above case and cause having come on regularly for trial on the 19th day of March, 1951, and thereafter continued until the 2nd day of April, 1951, before the Honorable Gus J. Solomon pre-

siding and the following having appeared: The plaintiff United States Fidelity and Guaranty Company, by W. K. Phillips, its attorney; the defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company, by their attorney Randall Kester; the defendants William Morris and Beulah Morris by their attorney Harry Samuels; the defendant Raymond Suter not appearing. And, each of the parties by and through their attorneys having signed the pre-trial order in open court and the same being approved by the Honorable Gus J. Solomon, and evidence having been presented and arguments having been made and the court now being fully informed in the premises, the court now does make the following:

Findings of Facts

I.

That at all times herein mentioned the United States Fidelity and Guaranty Company is and was a corporation organized and existing under and by virtue of the laws of the state of Maryland, and had qualified and was doing business in the state of Oregon as an insurance company.

II.

That the defendant Oregon Automobile Insurance Company is and was at all times herein mentioned an Oregon corporation, qualified to and carrying on an insurance business within the state of Oregon.

III.

That the defendants Houk Motor Company and Redmond Motor Company were at all times herein mentioned corporations of the state of Oregon and each such corporation was carrying on an automobile sales agency and garage within the state of Oregon.

IV.

That the defendants Beulah Morris and William Morris are residents and inhabitants of the state of Washington, and are husband and wife.

V.

That this court does have and take jurisdiction of this suit.

VI.

That at all times herein mentioned the United States Fidelity and Guaranty Company had in full force and effect a certain policy of insurance which insured the defendant Raymond Suter for the period from June 4, 1949, to June 4, 1950. A copy of said policy is hereinafter identified as Pre-trial Exhibit No. 1.

VII.

That at all times herein mentioned the Oregon Automobile Insurance Company had in full force and effect a certain policy of insurance which insured the Houk Motor Company, Redmond Motor Company and Redmond Tractor Company for the period from October 1, 1949, to October 1, 1950. A copy of said policy is hereinafter identified as Pre-trial Exhibit No. 2.

VIII.

That on or about October 15, 1949, the defendant Raymond Suter was driving and operating a certain Mercury automobile, bearing dealer's license A75, belonging to the defendant, Redmond Motor Company, with the knowledge and consent of the Redmond Motor Company. At said time a collision occurred between the vehicle Raymond Suter was operating and an automobile in which the defendant Beulah Morris was a passenger, as a result of which said Beulah Morris received certain personal injuries.

IX.

That thereafter the said defendant Beulah Morris did bring an action at law for the said personal injuries in the Circuit Court of the State of Oregon for the County of Deschutes, commonly known as case No. 7784, in which Raymond Suter, Houk Motor Company and James Stuchlik were named as defendants; that thereafter and on or about the 20th day of November, 1950, the said cause was tried, resulting in a verdict and judgment against the defendant Raymond Suter alone, in the sum of $7,360.00, and that thereafter costs were taxed against the defendant Raymond Suter, and in favor of the plaintiff, in the sum of $114.83.

X.

That the said judgment and cost bill are now in full force and effect and have not been paid or satisfied and are due and payable, with interest at the rate of six per cent per annum from the 27th day of November, 1950.

XI.

That the said Beulah Morris did, during the pendency of the action in the county of Deschutes hereinabove referred to, bring an action at law for damages in the County of Marion, State of Oregon, which action was entitled, "Beulah Morris v. Raymond Suter and James Stuchlik." In said Marion county action said Beulah Morris sought to recover for the same personal injuries, arising from the same accident, as alleged in said Deschutes county action. Said Marion county action was abandoned by the plaintiff therein, and an order of voluntary nonsuit was entered prior to the trial of the Deschutes county action above mentioned.

XII.

On or about December 6, 1950, defendant William Morris, who was the owner and driver of the automobile in which Beulah Morris was riding at the time of said accident, commenced an action in the Circuit Court of the State of Oregon for the county of Deschutes, against Raymond Suter, Redmond Motor Company and James Stuchlik, defendants, No. 8007, wherein judgment is demanded against said defendants in the following amounts: personal injuries to William Morris, $1,500.00; property damage to his automobile, $250.00; loss of consortium by reason of the injuries to Beulah Morris, $7,500.00; together with costs and disbursements. Said action is now pending.

XIII.

With respect to the action brought in Marion

County by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of $223.20.

XIV.

With respect to the action brought in Deschutes county by Beulah Morris, plaintiff employed attorneys who represented said Raymond Suter, and plaintiff paid to said attorneys a reasonable fee and costs advanced in the total sum of $428.80, and plaintiff paid an additional sum of $97.83 as expenses.

XV.

That the defendant Oregon Automobile Insurance Company did investigate the accident hereinabove referred to and did defend the defendants Houk Motor Company in the Deschutes County action of Beulah Morris vs. Raymond Suter, Houk Motor Company and James Stuchlik, case #7784.

XVI.

That the defendant Oregon Automobile Insurance Company has not paid to Beulah Morris nor the United States Fidelity and Guaranty Company any amount of money whatsoever on either the judgment, costs, interests, attorneys' fees or expenses.

XVII.

That the material paragraphs of the Oregon Automobile Insurance Company's policy reads as follows, to wit:

"Additional Assured. The insurance granted by Clauses E and F shall in the same manner and

under the same conditions, declarations and exclusions as to the assured, apply to any person while legally operating any automobile described in the 'Schedule of Warranties' with the permission of the Assured, and also to any person, firm or corporation legally responsible for the use thereof, provided the declared and actual use of the automobile is 'Business and Pleasure' or 'Commercial' each as defined herein, and provided furthermore the actual use is with the permission of the named Insured, (provided that any Additional Insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy); provided further that in the event that the Assured and/or the Additional Assured suffer bodily injury, or death, or damage to property through the act or omission of any other person occupying or operating said automobile, such person shall not be an Additional Assured within the terms or conditions of this policy; provided further that in the event a person who would otherwise be an Additional Assured by reason of having been given permission to operate the car shall permit another to operate the car, neither party shall be an Additional Assured or be entitled to coverage under this policy. The insurance herein granted to such Additional Assured shall be subject to all of the conditions, declarations and exclusions of this policy, and said conditions, declarations and exclusions shall apply to and be binding upon the Additional Assured in the same manner and with the same effect as to and upon the Assured, and it shall be the duty

of the Additional Assured to comply with and perform all of the conditions and requirements of this policy. If an automobile covered by this policy is sold or transferred, the indemnity provided herein shall not extend to such purchaser or transferee, unless the interest in the policy is assigned in accordance with all the conditions relating to the manner of such transfer.

"Other Insurance. If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Warranties bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, that the insurance under Paragraph 'Drive Other Private Passenger Automobiles' shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under said paragraph; and further this company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy."

XVIII.

That the material paragraphs of the plaintiff's policy reads as follows, to wit:

"Use of Other Automobiles: If the named insured

is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

"(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'Insured' includes

"(1) Such Named Insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such Named Insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

"Other Insurance—Coverages A and B. If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under the Insuring Agreement IV shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to said automobiles or otherwise."

XIX.

That the plaintiff the United States Fidelity & Guaranty did tender to the defendant, Oregon Automobile Insurance Co., the defense of Raymond Suter in the Deschutes County action of "Beulah Morris vs. Raymond Suter, Houk Motor Company, and James Stuchlik" and also the defense of the said Raymond Suter in the action brought by Beulah Morris in the County of Marion, entitled "Beulah Morris vs. Raymond Suter and James Stuchlik," and did demand that the Oregon Automobile Insurance Company pay the expenses of defending each of the said actions and pay any resulting judgment in either of the said actions, and accept coverage under their policy.

XX.

That the plaintiff, U. S. Fidelity & Guaranty Company, did tender to the defendant Oregon Automobile Insurance Company the defense of Raymond Suter in the action brought by William Morris vs. Raymond Suter, Redmond Motor Company and James Stuchlik, and did demand that the said Oregon Automobile Insurance Company accept coverage under the provisions of their policy and defend the said Raymond Suter in said action.

XXI.

That the defendant, Oregon Automobile Insurance Company, did and has denied coverage under its policy and did and has refused to defend the said Raymond Suter, or to pay any of the costs or expenses of his defense and has denied any and all

liability under its said policy to the said Raymond Suter, and has and does now refuse to reimburse the plaintiff U. S. Fidelity & Guaranty Company for the costs and expenses advanced by it in the defense of the said Raymond Suter.

Based on the above Findings of Fact, this court does make and enter the following:

Conclusion of Law

I.

That the Oregon Automobile Insurance Company by virtue of its policy of insurance, Pre-trial Ex. 2, did insure and cover Raymond Suter and did protect him against legal liability for damages arising out of the accident which occurred on the 15th day of October, 1949, between the Mercury automobile which he was driving and that driven by William Morris, in Deschutes County, Oregon.

II.

That by virtue of its policy of insurance, the Oregon Automobile Insurance Company was required to defend the said Raymond Suter in all actions brought against him for damages arising out of that said accident and to pay all expenses of his defense, and any resulting judgments rendered against him up to the limits of their disclosed liability, but not more than One Hundred Thousand ($100,000.00) Dollars, and costs of defense.

III.

That the policy of the Oregon Automobile Insur-

ance Company, provides the primary coverage and insurance insuring the said Raymond Suter, and that policy written by the U. S. Fidelity and Guaranty Company, "Pre-trial Ex. I," is excess insurance and secondary to that provided by the defendant, Oregon Automobile Insurance Company, and that there is not, nor was there any liability on the part of the U. S. Fidelity & Guaranty Company to defend Raymond Suter, or pay any judgments against him until the Oregon Automobile Insurance Company had expended the full amount of its coverage.

IV.

That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Seven Thousand Four Hundred Seventy-four and 83/100 ($7,474.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 20th day of November, 1950.

V.

That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Two Hundred and Fifty ($250.00) Dollars attorneys fees for prosecuting their declaratory judgment suit.

VI.

That the plaintiff the U. S. Fidelity and Guaranty Company is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Seven Hundred Forty-five

and 83/100 ($745.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 26th day of December, 1950.

VII.

That Beulah Morris is not entitled to any recovery from the plaintiff, the U. S. Fidelity and Guaranty Company.

VIII.

That none of the parties hereto shall recover costs or disbursements in this cause.

Dated this 19th day of July, 1951.

/s/ GUS J. SOLOMON,
U. S. District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1951.

In the United States District Court
for the District of Oregon

Civil No. 5890

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Plaintiff,

vs.

OREGON AUTOMOBILE INSURANCE COMPANY, RAYMOND SUTER, WILLIAM MORRIS, BEULAH MORRIS, HOUK MOTOR COMPANY and REDMOND MOTOR COMPANY,

Defendants.

JUDGMENT AND DECREE

The above-entitled cause having come on regularly for trial on the 28th day of March, 1951, and thereafter concluded on the 2nd day of April, 1951, before the undersigned Judge of the above-entitled Court, and this Honorable Court having heretofore found, made and entered its Findings of Fact and Conclusions of Law and based upon the said Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

That the insurance policy issued by the Oregon Automobile Insurance Company, policy #332583, did insure and cover Raymond Suter and that the said Oregon Automobile Insurance Company is re-

quired to pay on behalf of the said Raymond Suter all sums which he became legally obligated to pay, and all damages and costs assessed against him, because of personal injury or property damages sustained and suffered by either or both William Morris and Beulah Morris by virtue of that said accident which happened on or about the 15th day of October, 1949, in the County of Deschutes, State of Oregon.

II.

That the said policy of insurance written by the Oregon Automobile Insurance Company is primary insurance for the benefit of the said Raymond Suter, and the policy made, executed and delivered by the plaintiff, United States Fidelity and Guaranty Company, is excess insurance to that written by the Oregon Automobile Insurance Company, or secondary, and that the plaintiff, United States Fidelity and Guaranty Company, is not required to pay or to assume any obligation whatsoever by virtue of its policy for the legal liability of Raymond Suter to William Morris and/or Beulah Morris until such time as the Oregon Automobile Insurance Company has expended the full face of its policy, namely, $100,000.00.

III.

That the defendant, Beulah Morris, have judgment against the Oregon Automobile Insurance Company in the sum of $7,360.00, plus costs in the sum of $114.43, together with interest on the said sums at the rate of (6%) six per cent per annum from the 27th day of November, 1950.

IV.

That Beulah Morris have judgment against the defendant, Oregon Automobile Insurance Company, in the sum of Two Hundred and Fifty ($250.00) Dollars attorneys fees herein.

V.

That the plaintiff, United States Fidelity and Guaranty Company, have judgment against the defendant, Oregon Automobile Insurance Company, for the sum of Seven Hundred Forty-five and 83/100 ($745.83) Dollars, together with interest thereon, at the rate of (6%) six per cent per annum from the 26th day of December, 1950.

VI.

That Beulah Morris recover nothing off of and from the plaintiff, the United States Fidelity and Guaranty Company.

VII.

That no costs be allowed to any party.

VIII.

That the terms and provisions of this decree and judgment be carried out and enforced and that execution issue immediately.

Done in open court this 19th day of July, 1951.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed July 19, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Oregon Automobile Insurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment and Decree entered in this action on July 19, 1951.

/s/ RANDALL B. KESTER,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Attorneys for Appellant.

[Endorsed]: Filed August 13, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents, that we, Oregon Automobile Insurance Company, as principal, and United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, and licensed to do a surety business in the State of Oregon, as surety, are held and firmly bound unto defendant, Beulah Morris, her heirs, representatives and assigns, in the full sum of Nine Thousand Dollars ($9,000.00), and unto plaintiff, United States Fidelity and Guaranty Company, its successors and assigns, in the full sum of One Thousand Dollars ($1,000.00); to which pay-

ments, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of the above obligation is such that whereas, on the 19th day of July, 1951, a final judgment and decree was entered in the above-entitled court and cause against defendant, Oregon Automobile Insurance Company, and said defendant has commenced an appeal therefrom to the United States Court of Appeals for the Ninth Circuit. Now, Therefore, if said defendant, Oregon Automobile Insurance Company, shall satisfy said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation shall be void; otherwise it shall remain in full force and effect.

Sealed with our seals and dated this 13th day of August, 1951.

[Seal] OREGON AUTOMOBILE INSURANCE COMPANY,

By /s/ MAXWELL N. UNGER,
Principal.

[Seal] UNITED PACIFIC INSURANCE COMPANY,

By /s/ C. S. McDONALD,
Attorney in Fact.

Countersigned at Portland, Oregon.

[Seal] WALTER J. PEARSON & CO.,
General Agents.

By /s/ WALTER J. PEARSON,
Pres., Resident Agent.

Form of bond and sufficiency of surety approved this 15th day of August, 1951.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed August 17, 1951.

[Title of District Court and Cause.]

TRANSMITTAL OF EXHIBITS

On motion of defendant-appellant, Oregon Automobile Insurance Company, and good cause appearing therefor, it is hereby

Ordered, that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of this cause, all of the original papers and exhibits, in accordance with the usual practice of this court in regard to the safekeeping and transportation of such papers and exhibits.

Done this 15th day of August, 1951.

/s/ GUS J. SOLOMON,
Judge.

Service of Copy acknowledged.

[Endorsed]: Filed August 17, 1951.

United States District Court,
District of Oregon

No. Civil 5890

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Plaintiff,

vs.

OREGON AUTOMOBILE INSURANCE COMPANY, RAYMOND SUTER, WILLIAM MORRIS, BEULAH MORRIS, HOUK MOTOR COMPANY and REDMOND MOTOR COMPANY,

Defendants.

March 19, 1951

Before: Honorable Gus J. Solomon,
Judge.

Appearances:

W. K. PHILLIPS,
Of Attorneys for Plaintiff.

RANDALL B. KESTER,
Of Attorneys for Defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company.

HARRY F. SAMUELS,
Of Attorneys for Defendants William Morris and Beulah Morris.

TRANSCRIPT OF PROCEEDINGS

The Court: U. S. Fidelity and Guaranty Company vs. Oregon Automobile Insurance Company.

Is any testimony going to be taken in this case?

Mr. Phillips: I don't think so, your Honor. What has occurred, last February I submitted a proposed pre-trial order, and this morning Mr. Kester just submitted another one and I have not had an opportunity to digest it. I presume it is all right unless there are some radical changes.

As I view the case, the only thing we are interested in is your interpretation of two paragraphs of the two insurance policies.

The Court: The interpretation of two paragraphs of the policies?

Mr. Phillips: That is all, your Honor. Mr. Kester just furnished me now with a copy of the Oregon Automobile Insurance Company's policy.

The Court: I don't know that I understand what the case is about. I just looked at it generally. Is it a garage policy, liability policy?

Mr. Phillips: Yes, your Honor. I can give you a recital of the facts, if you desire.

The Court: All right. Go ahead. I just want to know what the basis is of the Oregon Auto denying liability and the U. S. F. & G.

Mr. Phillips: The U. S. F. & G.'s denial of liability, your Honor, is that the policy they had written on this defendant Suter did not cover him except as excess insurance when he was driving

another automobile, not the one covered by the [2*] United States Fidelity and Guaranty policy.

What occurred was, the United States Fidelity and Guaranty Company had written a $5,000 policy on, I think it was, a Plymouth or a Pontiac, or some car, that was owned by Suter, the defendant. Then he went over to either the Houk Motor Company or the Redmond Motor Company, I don't know which, and they wanted to sell him a new Mercury car. He took this Mercury car to go from Redmond to Bend. On the way, either going or coming back, he had an accident that resulted in the judgment, while he was driving the automobile owned by the Motor Company.

The Court: But he owned the Plymouth car upon which the policy was issued by the U. S. F. & G.?

Mr. Phillips: That is correct, but he was not driving it. He was driving another automobile owned by the Houk Motor Company. I believe it was the Houk Motor Company.

The Court: You claim that you are the excess carrier?

Mr. Phillips: That is what I claim; yes, your Honor.

The Court: And the Oregon Auto says that they are not on the risk because of the garageman's liability policy; is that it?

Mr. Kester: No, your Honor. This is one of those cases of which came first, the hen or the egg.

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The U. S. F. & G. policy says that when the assured is driving another car their policy is excess only. Our policy says that when someone other than [3] the named assured is driving one of the cars belonging to the named assured then our policy does not cover at all if the driver has other valid and collectible insurance. Now in this case the U. S. F. & G.'s assured was driving our car. He became an additional assured under our policy except for the fact of having the U. S. F. & G. policy, which, as we see it, is other valid and collectible insurance, and then it is excluded under our policy entirely. So I am inclined to agree with Mr. Phillips that the only issues here are purely legal questions as to the interpretation of the two policies.

The Court: Whom do you represent, Mr. Samuels?

Mr. Samuels: I represent the Morrises, who have the judgment and who have another case pending. We were sued because of the interest in the unpaid judgment over in Deschutes County.

The Court: You want to collect the judgment?

Mr. Samuels: I would like to.

The Court: It is the contention of Oregon Auto that, U. S. F. & G. having written the policy, it is not liable to any extent even as excess over the U. S. F. & G.?

Mr. Kester: I would qualify that to a certain extent, your Honor. It is our position that we are not liable at all as long as the U. S. F. & G. policy exists as other valid and collectible insurance. Now, Harry Samuels' client, Mrs. Morris, has a judg-

ment over in Deschutes County for seven thousand-odd dollars, which is more than the U. S. F. & G. limits, which are only $5,000 [4] for one person. Now we concede that when the U. S. F. & G. has paid its $5,000 on the Samuels' judgment then it ceases to be valid and collectible insurance as far as that judgment is concerned.

The Court: And they state the same thing as far as you are concerned?

Mr. Kester: They take the position that they are excess only. Our position is a little different, because, as we see it, our liability does not arise until their policy has been exhausted. Then we admit that we would have to pay the balance.

The Court: That ought to be a simple issue. I mean, it is only one issue. It might be a difficult legal problem. Let's take a five-minute recess and I will take a look at the proposed order.

(Short recess.)

The Court: Mr. Kester, do you want to make a statement now?

Mr. Kester: If your Honor please, we have agreed on a form of pre-trial order which sets up the legal questions arising on the construction of these two policies. There is a suggestion that there might be a factual issue in the nature of estoppel in the event the Court should hold that the Oregon Automobile Insurance policy applies to the accident. Pardon me. It is the other way around. In the event the Court should hold the Oregon Automobile policy does not apply to the accident then there

may be a question of estoppel, which, as I understand [5] it, it is contended by the other parties would change the legal effect of the policy as the Court might otherwise hold it to be. But we have agreed that the Court can segregate the issue and try first the question of the legal construction of the two policies on the basis of the language of the policies themselves, and if it becomes necessary to hold a further hearing on the question of estoppel then either party may ask leave to amend the pretrial order to set forth more specifically its position on that factual matter.

We have here the two policies. I have the original of the Oregon Automobile policy which will be marked as Exhibit 2, and Mr. Phillips has a copy, I believe, of the U. S. F. & G. policy, which will be Exhibit No. 1.

The Court: Have those two exhibits marked.

(A specimen copy of Automobile Liability Policy of United States Fidelity and Guaranty Company was thereupon marked and received in evidence as Plaintiff's Exhibit 1; the original policy issued by Oregon Automobile Insurance Company to Houk Motor Company, Redmond Motor Company and Redmond Tractor Company was thereupon marked and received in evidence as Plaintiff's Exhibit 2.)

PLAINTIFF'S EXHIBIT No. 1

[Specimen copy of United States Fidelity and Guaranty Company Liability Policy. See page 15 of this printed transcript.]

STOCK COMPANY

COMBINED AUTOMOBILE POLICY

Policy No. 332583

Oregon Automobile Insurance Company

(HEREIN CALLED THE COMPANY)

HOME OFFICE — PORTLAND 4, OREGON

IN CONSIDERATION OF THE WARRANTIES AND PREMIUMS HEREINAFTER MENTIONED

first to ..... and balance, if any, to Assured, as their respective interests may appear.

5. During the life of this policy the automobile described herein will be used only for business and pleasure—commercial. The term "business and pleasure" is defined as personal, pleasure, family and business use; the term "commercial" is defined as use principally in the business occupation of the named Insured stated in Item 1, including occasional use for personal, pleasure, family and other business purposes. Use of the Automobile for the purposes stated includes the loading and unloading thereof.

6. During the life of this policy the automobile described herein will not be (a) used as a public or livery conveyance unless such use is specifically declared and described in this policy and a premium charged therefor; (b) towing or propelling trailers or other vehicles, excepting Trailers used only for personal, pleasure or family purposes, while being used with an automobile of the private passenger type to which this policy applies, however this exclusion shall apply to Trailer Homes and Trailers used for business purposes other than a Trailer of the private passenger type owned by a farmer and used in connection with the operation of a farm; nor with respect to the automobile while used with any trailer not covered by like insurance in the company; nor with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company; (c) in any work connected with a garage, repair shop, sales agency or service station, or public parking place; (d) rented to others, except

as herein stated ..... As per Endorsements attached .....

7. The automobile described herein is principally garaged and used at or in the vicinity of the above address of the named assured unless herein stated.

No Exceptions

8. Have you ever been refused insurance on any automobile, or have you ever had a policy of automobile insurance cancelled, and if so give name

of Company ..... No Exceptions .....

This policy is made and accepted subject to the foregoing warranties and to the stipulation and conditions printed hereinafter, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be be claimed by the Assured unless so written or attached and signed by an officer or other duly authorized representative of the Company.

Countersigned at ..... Bend ....., Oregon, this ..... 1st ..... day of ..... October ....., 1949

LUMBERMENS INSURANCE AGENCY

BY ..... Authorized Representative

PRESIDENT

STOCK COMPANY

COMBINED AUTOMOBILE POLICY

olicy No. 3325883

Oregon Automobile Insurance Company

(HEREIN CALLED THE COMPANY)

HOME OFFICE—PORTLAND 4, OREGON

IN CONSIDERATION OF THE WARRANTIES AND PREMIUMS HEREINAFTER MENTIONED

Does Insure HOUK MOTOR CO., REDMOND MOTOR CO. AND REDMOND TRACTOR CO.
(Individual, Co-partnership, Corporation)

of ..... No. ..... Street REDMOND City DESCHUTES County OREGON State and legal representatives

from the FIRST day of OCTOBER, 1949, to the FIRST day of OCTOBER, 1950, 12:01 A. M., Standard Time at the address of the named Insured as stated herein, against direct loss or damage from the perils insured against, as set forth herein and for which a premium is charged and coverage indicated in the following Schedule:

This insurance to be effective on the body, machinery and equipment of the automobile or automobiles described herein (or the liability for its ownership, maintenance or use), while within the United States of America, its territories or possessions, Canada or Newfoundland, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits.

SCHEDULE OF INSURANCE

(The Perils insured against, as hereinafter described, and the limits of liability and the premiums therefor, are as follows:)

ENDORSEMENTS:	AMOUNT OF INSURANCE AND MAXIMUM LIABILITY OF COMPANY	PREMIUM
	A. Fire, Lightning and Transportation $ ...	$
	B. Theft ... $ ...	$
	C. Comprehensive ...	$
	D. Collision State form of collision covering for which premium is charged.	$
	E. Property Damage—Limit $5,000 ...	$ 187.22
	F. Bodily Injury—Limits, 1 person, XXX 1 accident XXX If other Limits are desired cross out the above and indicate desired limits below.	$
	1 Person $100,000. ...; 1 Accident 100,000.	$ 431.97
	G Medical Payments—Limits of Liability for Each Person ... Named Insured and guests ... Named Insured only ... Guests only ...	$
	H. Other Coverage Additional Interests-Blanket - Hoist Property Damage and Collision Cargo Liability - Towing (Applicable to automobiles described herein.)	$ 124.03 $ 27.00 $ 100.00
	WARRANTIES	Total Premium $ 870.22

PLAINTIFF'S DEFENDANT'S EXHIBIT 2 Case No. C.v. 1790 JOHN S. BECKWITH Reporter

The following are statements of facts known to and warranted by the Assured to be true, and this Policy is issued by the Company relying on the truth thereof.

1 Assured's occupation or business is Automobile Dealer Employed by

2. If Assured is married woman give name and occupation of husband

3. Description of the automobile and facts respecting its purchase by the named insured

YEAR	MODEL	TRADE NAME	CAPACITY	TYPE OF BODY	FACTORY NO.	MOTOR NO.
policy as per endorsements attached hereto and becoming a part hereof						

4. The facts with respect to the purchase of the automobile described are as follows.

Date Purchased by/in'g Month	Year	New or Used	Including Equipment Actual Cost to Assured	Cost New	The interest of the Assured is sole and unconditional ownership, without encumbrances, except as shown here, and Loss hereunder shall be payable first to ... and balance, if any, to Assured, as their respective interests may appear.

6 During the life of this policy the automobile described herein will be used only for business and pleasure—commercial. The term "business and pleasure" is defined as personal, pleasure, family and business use, the term "commercial" is defined as use principally in the business occupation of the named Insured stated in Item 1, including occasional use for personal, pleasure, family and other business purposes. Use of the Automobile for the purposes stated includes the loading and unloading thereof.

8. During the life of this policy the automobile described herein will not be (a) used as a public or livery conveyance unless such use is specifically declared and described in this policy and a premium charged therefor; (b) towing or propelling trailers or other vehicles, excepting Trailers used only for personal, pleasure or family purposes, while being used with an automobile of the private passenger type to which this policy applies, however this exclusion shall apply to Trailer Homes and Trailers used for business purposes other than a Trailer of the private passenger type owned by a farmer and used in connection with the operation of a farm, nor with respect to the automobile while used with any trailer not covered by like insurance in the company; nor with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company; (c) in any work connected with a garage, repair shop, sales agency or service station, or public parking place; (d) rented to others, except

as herein stated As per Endorsements attached

7. The automobile described herein is principally garaged and used at or in the vicinity of the above address of the named assured unless herein stated No Exceptions

9. Have you ever been refused insurance on any automobile, or have you ever had a policy of automobile insurance cancelled, and if so give name of Company No Exceptions

This policy is made and accepted subject to the foregoing warranties and to the stipulation and conditions printed hereinafter, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached and signed by an officer or other duly authorized representative of the Company.

Countersigned at Bend, Oregon, this 1st day of October, 1949

LUMBERMENS INSURANCE AGENCY

BY ..... Authorized Representative

2

OREGON AUTOMOBILE INSURANCE COMPANY

PERILS INSURED AGAINST

(Only as to items for which a premium is specified in the "Schedule of Insurance")

(A) FIRE, LIGHTNING AND TRANSPORTATION. To pay for loss of or damage to the automobile caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is stored, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water, and for general average and salvage charges for which the Assured is legally liable.

(B) THEFT. Loss or damage from larceny, robbery or pilferage, excepting by any person or agent thereof, or by the agent of any firm or corporation, to which person, firm or corporation the Assured or anyone acting under the express or implied authority of the Assured, voluntarily parts with title and/or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense. This policy does not insure against the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession of the insured property under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal.

LOSS OF USE BY THEFT (RENTAL REIMBURSEMENT). This provision is applicable only to private passenger automobiles not used to carry persons for a charge and not owned and held for sale by automobile dealers.

The company shall reimburse the Insured for expense, not exceeding $5 for any one day nor totaling more than $150 or the actual cash value of the automobile at time of theft, whichever is the less, necessarily incurred for taxi or livery fares or for the rental of a substitute automobile following a theft covered hereunder of the described Automobile.

Reimbursement is limited to such expense incurred during the term commencing seventy-two (72) hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the Automobile becomes known to the Insured or on such earlier date as the company makes or tenders settlement for such theft.

(C) COMPREHENSIVE. Any loss or damage to the insured automobile and the equipment usually attached thereto, including damage by missiles or falling objects, but excluding loss caused by accidental collision with another object or by upset, or by collision of the automobile with a vehicle to which it is attached, and also excluding damage to tires, excepting where such damage shall be directly caused by, and resulting from other loss or damage which is covered hereunder, but breakage of glass and damage caused directly by tornado, cyclone, windstorm, hail, falling aircraft or parts thereof and damage resulting from theft, earthquake, explosion, riot, riot attending a strike, insurrection or civil commotion shall not be deemed a loss caused by collision or upset

(D) COLLISION. Damage to Assured's automobile caused by accidental collision with another object or by upset, excluding loss or damage caused directly or indirectly by (1) fire, (2) theft, (3) water, whether caused by immersion therein or otherwise, and excluding loss or damage to any tire due to puncture, cut, gash, blow-out or other ordinary tire trouble, and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile In case a Deductible Coverage is indicated in the "Schedule of Insurance", each accident shall be deemed a separate claim, and the amount specified as being deductible in the "Schedule of Insurance" shall be deducted from the amount of each loss when determined, and the Company shall be liable for loss or damage only in excess of that amount.

CONVERTIBLE COLLISION OR UPSET. To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile Upon the occurrence of the first loss for which payment is sought hereunder the Insured shall pay to the Company the additional payment stated in the Schedule of Insurance Loss caused by collision or upset occurring prior to the first loss for which payment is sought hereunder is not covered.

CUMULATIVE COLLISION OR UPSET. To pay for any loss of or damage to the automobile caused by collision with another object or by upset of the automobile, in excess of the aggregate amount of the Insured's retention stated in the Schedule of Insurance. For credit under the aggregate retention, the Insured must make immediate report to the Company of any loss and file with the Company a receipted bill for repairs within thirty days thereafter. When the Insured has expended the amount of the retention for repairs made necessary by collision or upset and has filed with the Company satisfactory evidence thereof, the Company will thereafter assume the total expense of all other collision or upset losses during the term of this coverage. In no event shall any retention credit of the Insured be considered as premium paid to the Company, and the cancellation provisions of the policy shall apply only to the premium paid to the Company.

80% COLLISION OR UPSET ENDORSEMENT. To pay for loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for 80% of the first $250 of each such loss and for 100% of the amount in excess thereof, subject to conditions in Clause (D) Collision, appearing in body of the policy.

(E) DAMAGE TO PROPERTY OF OTHERS. Claims arising from the legal liability of the Assured for damage to or destruction of any property (including the resultant "Loss of Use" of such property) on account of any accident proximately due to the ownership, maintenance or use of the insured automobile, excluding, however, property of the Assured or property in the custody of the Assured, or any of his employees, and for which the Assured is legally responsible, or property carried in or upon the automobile of the Assured and not exceeding as to any one accident, the limit set forth in the "Schedule of Insurance."

(F) BODILY INJURY LIABILITY arising from the legal liability of the Assured to others, excluding employees in the service of the Assured and other persons performing services for the Assured for compensation as independent contractors or otherwise, for bodily injuries accidentally sustained, including death at any time resulting therefrom, on account of any accident proximately due to the ownership maintenance or use of the insured automobile, not exceeding the limits set forth in the "Schedule of Insurance". The Company's limit of liability (unless otherwise stated in the "Schedule of Insurance") on account of one person injured or claimed to have been injured, including death at any time resulting therefrom, shall be $5000.00, and, subject to the same limit for each person, the Company's total liability on account of any one accident so injuring or killing more than one person shall be $10,000.00. These limits shall apply to each automobile insured hereunder.

(G) COVERAGE—MEDICAL PAYMENTS. To pay to or for each person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the automobile classified as "pleasure and business" if the injury arises out of the use thereof by or with the permission of the named insured or (2) any other private passenger automobile with respect to the use of which insurance is afforded under paragraph DRIVE OTHER AUTOMOBILES, if the injury arises out of the use thereof and results from (a) the operation of said automobile by the named insured or spouse or by a private chauffeur or domestic servant of either or (b) the occupancy of said automobile by the named insured or spouse, the reasonable expense of necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of accident.

The insurance afforded with respect to such other automobiles shall be excess insurance over any other valid and collectible Medical Payments insurance applicable thereto.

The limit of liability for medical payments stated in the Schedule of Insurance as applicable to "each person" is the limit of the Company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, including death resulting therefrom, in any one accident. The inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

The injured person or someone on his behalf shall, as soon as practicable after each request from the Company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the Company to obtain medical reports and copies of records The injured person shall submit to physical examination by physicians selected by the Company when and as often as the Company may reasonably require.

As soon as practicable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for medical payments or after the expiration of one year from the date of the accident, whichever is the first, the injured person or someone on his behalf shall give to the Company written proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefor and the amounts paid thereon. Upon the Company's request, the injured person or someone on his behalf shall cause to be given to the Company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The Company shall have the right to make payment at any time to the injured person or to any such person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the Insured or, except hereunder, of the Company.

(H) OTHER COVERAGE.

Conditions Relating to Clauses E and F of "Perils Insured Against"

ADDITIONAL COVERAGE. The Company will investigate all claims and accidents covered hereunder and defend in the name and on behalf of the Assured all suits thereon, even if groundless, upon notice being given and upon full and complete compliance with all the terms and conditions of the policy by Assured, and will pay in addition to the limits set forth in Clauses E and F the expenses (including as a part thereof court costs, all premiums on any bonds required in such proceedings, and all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the Company's limits of liability as expressed herein) incurred by it in such investigation and defense, providing that in the event a claim is made in excess of the Company's limits, the Company, upon notice to the Assured and or Additional Assured of its willingness to pay the face amount of its policy as set forth in its Schedule of Insurance, shall be thereupon relieved of any obligation to investigate, defend or pay the expenses of investigation or defense, or pay any sums whatsoever in excess of the policy limit set forth in said Schedule of Insurance. The Company will also reimburse the Assured for expenses incurred in providing such IMMEDIATE SURGICAL RELIEF at the time of the accident as is imperative.

BAIL BONDS. The company shall pay the cost of bonds, but without obligation to apply for or furnish such bonds, guaranteeing the insured's appearance in court if such appearance is required by reason of an accident or a traffic law violation occurring during the policy period and arising out of the use of an automobile with respect to which use insurance is afforded such insured under coverage (F) of this policy. The company's liability under this insuring agreement with respect to each bond shall not exceed the usual charges of Surety companies for such bond nor $100.00.

AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES. If the named insured who is the owner of the Automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him (a) if it replaces an Automobile described in this policy, and if it may be classified for the purpose of use stated in this policy, but only to the extent the insurance is applicable to the replaced Automobile, and (b) if it does not replace an Automobile described in this policy, and if it is used for pleasure purposes or in the business of the named Insured as stated in the Warranties, and if the company insures all automobiles owned by the named Insured at the date of such delivery, but only to the extent the insurance is applicable to all such previously owned automobiles The insurance afforded by this policy terminates upon the replaced Automobile at the date of such delivery.

As respects Coverages A, B, C, and D, such automatic coverage of the newly acquired automobile is in an amount not exceeding the actual cash value thereof under those coverages (a) applying only to the automobile it replaces, or (b) if an additional automobile, applying in common to all the Insured's automobiles.

The provisions of this Paragraph do not apply (a) to any loss against which the named Insured has other valid and collectible insurance, or (b) unless the named Insured notifies the company within thirty (30) days following the date of delivery of such other automobile, or (c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, or (d) unless the named Insured pays any additional premium required because of the application of this insurance to such other automobile.

TEMPORARY USE OF SUBSTITUTE AUTOMOBILE. While an automobile owned in full or in part by the named Insured is withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to such automobile applies with respect to another automobile not so owned while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an Insured the owner of the substitute automobile or any employee of such owner.

ADDITIONAL ASSURED. The insurance granted by Clauses E and F shall in the same manner and under the same conditions, declarations and exclusions as to the As[illegible] 1, apply to any person while legally operating any automobile described in the "Schedule of Warranties" with the permission of the Assured, [illegible] so to any person, firm or corporation legally responsible for the use thereof, [illegible]ided the declared and actual use of the automobile is "Busin[illegible]nd Pleasure" or "Commercial", each as defined herein, and provided furthe[illegible] the actual use is with the permission of the named Insured, (provided that any Additional Insured who is covered by valid and collectible [illegible] [illegible]nce against a claim also covered

hereby shall have no right of [illegible]very under this policy); provided further that in the event that the Assured or the Additional Assured suffer bodily injury, or death, or d[illegible]ge to property through the act or omission of any other person occupying or operating said automobile, such person shall not be an Additional Assured within the terms or conditions of this policy; provided further that in the event a person who would otherwise be an Additional Assured by reason of having been given permission to operate the car shall permit another to operate the car, neither party shall be an Additional Assured or be entitled to coverage under this policy. The insurance herein granted to such Additional Assured shall be subject to all of the conditions, declarations and exclusions of this policy, and said conditions, declarations and exclusions shall apply to and be binding upon the Additional Assured in the same manner and with the same effect as to and upon the Assured, and it shall be the duty of the Additional Assured to comply with and perform all of the conditions and requirements of this policy. If an automobile covered by this policy is sold or transferred, the indemnity provided herein shall not extend to such purchaser or transferee, unless the interest in the policy is assigned in accordance with all the conditions relating to the manner of such transfer.

DRIVE OTHER AUTOMOBILES. Such insurance as is afforded by this policy for bodily injury liability and for property damage liability with respect to the automobile classified as "pleasure and business" applies (1) to the named insured, if an individual and the owner of such automobile, or if husband and wife either or both of whom own such automobile, and (2) to the spouse of such individual if a resident of the same household, to the employer of such named insured or spouse and to the parent or guardian of such named insured or spouse, if a minor, as insured, with respect to the use of any other automobile by or in behalf of such named insured or spouse.

This insuring agreement does not apply:

(a) to any automobile owned in full or in part by, registered in the name of, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(b) with respect to such employer, parent or guardian, to any automobile owned in full or in part by him or registered in his name or hired by him as part of a frequent use of hired automobiles;

(c) to any automobile not of the private passenger type while used in the business or occupation of the named insured or spouse, or to any private passenger automobile while used in such business or occupation if operated by a person other than the named insured or spouse or such chauffeur or servant unless the named insured or spouse is present in such automobile;

(d) to any insured other than as defined in this insuring agreement;

(e) to injury to or death of any person who is a named insured;

(f) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

ASSAULT AND BATTERY. Assault and battery shall be deemed an accident unless committed by or at the direction of the Insured.

EXCLUSIONS

THIS POLICY OF INSURANCE DOES NOT COVER: (a) Loss or damage by fire or theft to robes, wearing apparel, personal effects or extra bodies, (b) depreciation, wear and tear, mechanical or electrical breakdown, failures or breakage, or freezing, (c) While being used for any purpose other than the purpose, or purposes, specified in Warranty No. 5 on Page 1 of this policy; (d) Loss or damage which may be caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, military, naval or usurped power or by order of any civil authority, (e) While the automobile described herein is being used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor, (f) Towing or propelling trailers or other vehicles, excepting trailers used only for personal, pleasure or family purposes, while being used with an automobile of the private passenger type with body unaltered, to which the policy applies, however, this exclusion shall apply to Trailer Homes and Trailers used for business purposes other than a trailer of the private passenger type owned by a farmer and used in connection with the operation of a farm; nor with respect to the automobile while used with any trailer not covered by like insurance in the company; nor with respect to any trailer covered by this policy while used with any automobile not covered by like insurance in the company, (g) in any work connected with a garage, repair shop, sales agency, service station, or public parking place except as stated in Warranty No. 6 on Page 1 of this policy, (h) While rented to others, unless noted under exceptions in Warranty No. 6 on Page 1 of this policy; (i) Accidents to domestic or household servants of Assured and/or Additional Assured when engaged in operating or caring for the automobiles described herein, (j) Liability of the Assured and/or Additional Assured by reason of bodily injury to, or death of, or damage to the property of a named Assured or Additional Assured by reason of any accident proximately due to the ownership, maintenance or use of the insured automobile; (k) Accidents to other employees or servants of Assured and/or Additional Assured arising out of the operation, maintenance, care or use of said automobiles regardless of the identity of the person, firm or corporation, operating, in charge of, or in possession of the automobile described herein; (l) Any obligation assumed by, or imposed upon the Assured or upon the Additional Assured by any workmen's compensation agreement, plan or law; (m) Under Clauses E and F, "Perils Insured Against", any liability assumed by the Assured under any contract or agreement; (n) Accidents occurring while the automobiles described herein are being operated, used or maintained beyond the limits of the United States of America, its territories or possessions, Canada or Newfoundland.

THIS INSURANCE IS SUBJECT TO THE FOLLOWING CONDITIONS:

1. **THE COMPANY SHALL NOT BE LIABLE BEYOND THE ACTUAL CASH VALUE OF THE PROPERTY AT THE TIME ANY LOSS OR DAMAGE OCCURS,** and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the Company to repair or replace the same with material of like kind and quality, such ascertainment or estimate shall be made by the Assured and the Company, or if they differ, then by appraisers as herein provided.

2. **ABANDONMENT.** It shall be optional with the Company to take all or any part of the property at such ascertained or appraised value and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice within thirty (30) days after the receipt of sworn statement of loss herein required of its intention so to do. The Company shall have the right to return a stolen automobile or other property with compensation for physical damage at any time before actual payment is made hereunder; but there can be no abandonment to the Company of the property described.

3. **LIMITATION OF LIABILITY.** This Company's liability under this policy is limited to the amounts as expressed in "Schedule of Insurance" and "Perils Insured Against", and the inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability

4. **AUTOMOBILE DEFINED—TWO OR MORE AUTOMOBILES.** Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semi-trailer described herein, and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

5. **NOTICE AND PROOF OF LOSS.** In the event of loss or damage the Assured shall give notice as soon as practicable thereof in writing to this Company, and within sixty (60) days after such loss, unless such time is extended in writing by this Company, shall render a statement to this Company signed and sworn to by the Assured, stating the place, time and cause of the loss or damage, the interest of the Assured and of all others in the property, the sound value thereof and the amount of loss or damage thereon, all encumbrances thereon, and all other insurance whether valid or not covering said property; and the Assured, as often as required, shall exhibit to any person designated by this Company all that remains of the property insured and submit to examination under oath by any person named by this Company, and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Upon the occurrence of an accident covered by Clauses E and F of this policy and covered by this policy, the Assured or Additional Assured shall give written notice as soon as practicable to the Company of the occurrence of said accident and detailed report of the manner in which said accident occurred, including the purpose for which said vehicle was being used, the name of the operator, and the circumstances under which said operator obtained possession of said automobile; upon request of the Company said Assured or Additional Assured shall give said detailed report in writing sworn to before a Notary Public or other officer authorised to administer oaths, and shall forward to the Company forthwith after receipt thereof, every written communication, or information as to any oral communication, and every process, pleading and paper of any kind relating to any and all claims and proceedings. The Company reserves the right to settle any claim or suit and the Assured shall not voluntarily assume any liability or interfere in any negotiation or legal proceedings conducted by the Company on account of any claim; or, except at his own cost, settle any claim, or incur any expense except such as is specifically mentioned in this policy. Every notice of communication to the Company shall be in writing and given at the Home Office of the Company at Portland, Oregon. In the event that a dispute shall arise between the company and the assured or another as to the liability of the company under this policy, the investigation of accidents, claims, or the defense of actions or suits in law or in equity shall not constitute an assumption or admission of liability under the policy or a waiver of any of the terms, conditions or exclusions thereof, and the company, with or without the consent of the assured, may at its option so investigate or defend with or without reservation of its rights under the policy.

6. **PROTECTION OF DAMAGED PROPERTY.** In the event of loss or damage occasioned by a peril insured against herein the Assured shall protect the property from further loss or damage and any such further loss or damage occurring directly or indirectly from a failure to protect shall not be recoverable under this policy. Any such act of Assured or this Company or its agents in recovering, saving and preserving the property described herein, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and all reasonable expenses thus incurred shall constitute a claim under this Policy, provided, however, that this Company shall not be responsible for the payment of a reward offered for the recovery of the insured property unless authorised by this Company.

7. **APPRAISAL.** In case the Assured and this Company shall fail to agree as to the amount of loss or damage under Clauses A, B, C, D or H of the "Perils Insured Against," each shall, on the written demand of either, select a competent and disinterested appraiser. The appraiser shall first select a competent and disinterested umpire; and failing for fifteen (15) days to agree upon such umpire, then, on request of the Assured or this Company, such umpire shall be selected by a judge of a court of record in the County and State in which the property insured was located at time of loss or damage. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item, and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemised, of any two, when filed with this Company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of the appraisal and umpire shall be paid by the parties equally.

8. **PAYMENT OF LOSS.** This Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for, and the loss shall in no event become payable until thirty (30) days after the notice, ascertainment, estimate and verified proof of loss herein required have been received by this Company, and if appraisal is demanded, then, not until sixty days after an award has been made by the appraisers.

9. **ACTION AGAINST COMPANY.** No suit or action on this policy under "Perils Insured Against" in Clauses A, B, C, D and H for the recovery of said claim shall be sustainable in any court of law or equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state. No action shall lie against the Company to recover upon any claim for liability insured against in Clauses E and F of "Perils Insured Against" unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against the Assured after trial of the issue or by an agreement between the parties with the written consent of the Company, nor in any event unless brought within one year thereafter. As relating to insuring Clause G, no action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty (30) days after the required proofs of claim have been filed with the Company.

10. **BANKRUPTCY** or insolvency of the Assured shall not relieve the Company of any of its obligations hereunder. If any person or his legal representatives shall obtain final judgment against the Assured because of any such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within sixty (60) days after it is rendered then such person or his legal representatives may proceed against the Company to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto.

11. **OTHER INSURANCE.** If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Warranties bears to the total applicable limit of

liability of all valid and collectible insurance against such loss; provided, however, that the insurance under Paragraph "DRIVE OTHER PRIVATE PASSENGER AUTOMOBILES" shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under said paragraph, and further this Company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.

12. **THE COMPANY SHALL NOT BE LIABLE UNDER THIS POLICY** if: (a) The interest of the Assured in the property be other than an unconditional and sole ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage, except as stated in Warranty No. 4 on Page 1 of this policy, or otherwise endorsed hereon; (b) If this policy or any part thereof shall be assigned without the consent of this Company endorsed hereon or in case of transfer or termination of any interest of the Assured other than by the death of an Assured, in which event if written notice be given to the Company within sixty (60) days after the date of such death the Company will cover any person having proper temporary custody of the automobile, as an assured, until the appointment and qualification as legal representative of the Assured, but in no event for a period of more than sixty (60) days after the date of such death; or by any change in the nature of the insurable interest of the Assured in the property described herein, either by sale or otherwise, except as hereinbefore stated.

13. **CO-OPERATION OF ASSURED.** The Assured shall aid in securing information, evidence, and in the attendance of witnesses, in effecting settlements, and in prosecuting appeals. The Assured shall at all times render to the Company all co-operation and assistance within his power, except in a pecuniary way.

14. **SUBROGATION.** In case of payment of loss and/or expense under this policy the Company shall be subrogated to all rights of the Assured to the extent of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company its rights.

15. **CANCELLATION.** This policy shall be cancelled at any time at the request of the Assured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short-rate premium for the expired term. This policy may be cancelled at any time by this Company by giving to the Assured a five (5) days' notice of cancellation with or without tender of the excess of paid premium above the pro-rata premium for the expired term, which excess if not tendered shall be refunded on demand. Notice of cancellation shall state that said excess premium, if not tendered, will be refunded on demand. Notice of cancellation mailed to the address of the Assured stated in this policy shall be sufficient notice.

16. **MISREPRESENTATIONS AND FRAUD.** This entire policy shall be void if the Assured or his agent or any one for whom benefits are payable has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

17. **INSPECTION.** The Company shall be permitted at all reasonable times during the policy period to inspect the automobile covered by this policy. The Company shall also have reasonable time and opportunity to examine any damaged automobile or its equipment covered hereby before repairs are undertaken or physical evidence of the damage removed, but the Assured shall not be prejudiced hereunder by any act on the Assured's part or in the Assured's behalf undertaken for the protection or salvage of the damaged automobile or its equipment.

18. **NO BENEFIT TO BAILEE.** Coverage under Clauses A, B, C and D of "Perils Insured Against" shall not inure directly or indirectly to the benefit of any carrier or bailee liable for loss of or damage to the automobile or automobiles insured hereunder.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE PROVISIONS, EXCLUSIONS, CONDITIONS AND WARRANTIES SET FORTH HEREIN OR ENDORSED HEREON, and upon acceptance of the Policy the Assured agrees that the terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein. No notice to any agent, knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the Company from asserting any right under the terms of this policy, and no officer, agent or other representative of this Company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached. In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed an agent of the Company.

Provisions required by law to be stated in this Policy—This Policy is in a stock corporation.

IN WITNESS WHEREOF the OREGON AUTOMOBILE INSURANCE COMPANY has caused these presents to be signed by its President; but this policy shall not be valid unless countersigned by a duly authorized representative of the Company.

PRESIDENT

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OREGON COMPANY

FOR

OREGONIANS

AUTOMOBILE INSURANCE

AN OREGON STOCK COMPANY

Writing the Following Classes of Insurance:

COMPLETE COVERAGE ON AUTOMOBILES
GENERAL CASUALTY LINES
and
FIRE INSURANCE
ON
SELECTED RISKS

Promptly notify our representative or the Home Office of the Company at Portland 4, Oregon, of any Accident or Loss

Keep Oregon Money in Oregon

STOCK COMPANY

COMBINED

AUTOMOBILE POLICY

No. 332583

HOUK MOTOR CO., REDMOND MOTOR CO. & REDMOND TRACTOR CO.

ASSURED

Expires October 1st, 1950

Oregon Automobile Insurance Company

of Portland, Oregon

PLEASE READ YOUR POLICY

Carefully Note Conditions Requiring Immediate Notice of Accidents or Loss

Endorsement #3
Garage Liability

Additional Interests
(Blanket Basis)

It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies subject to the following provisions:

1. To any employee of the named insured, as insured, provided:

(a) the insurance applies only to any such employee of the named insured, engaged in operations classified as "automobile dealer or repair shop," whose remuneration is included in the entire remuneration upon which premium for the policy is based; and

(b) the insurance afforded with respect to the ownership, maintenance or use of automobiles applies to any such employee while using, for such business operations or for pleasure purposes, any automobile covered under such classification.

2. To any other person or organization, as insured, provided:

the insurance applies only if the named insured's operations are classified as "automobile dealer or repair shop" and only with respect to the use, for such business operations or for pleasure purposes, of any automobile covered under such classification.

3. The insurance does not apply

(a) unless the actual use of the automobile is with the permission of the named insured;

(b) to any automobile owned by the insured, or by a member of his family, other than the named insured;

(c) with respect to injury to or death of any person who is a named insured;

(d) to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co., et al.

/s/ A. M. EPPSTEIN,
President.

Countersigned at Bend, Oregon, this 1 day of October, 1949.

LUMBERMENS INSURANCE AGENCY,

By /s/ [Indistinguishable],
Agent.

Hoist Property Damage Endorsement

In consideration of an Additional Premium charged herein, it is understood and agreed that coverage under this policy is extended to include liability imposed upon the insured by law for damages because of injury to or destruction of property in the care, custody or control of the insured, including the loss of use, thereof, caused by accident and arising out of the ownership, maintenance, or use of hoists, at premises owned, rented or controlled in whole or in part by the insured; but excluding the hoist(s) and its (their) equipment themselves and property considered to be the premises or portions thereof.

Limit of Liability hereunder not to exceed $1,000.00.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company, of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co. & Redmond Tractor Co.

/s/ A. M. EPPSTEIN,
President.

Countersigned at Bend, Oregon, this 1st day of October, 1949.

LUMBERMENS INSURANCE AGENCY,

By /s/ [Indistinguishable],
Agent.

Cargo Insurance Endorsement—
Towing Endorsement No. 2

In consideration of One Hundred and No/100ths ($100.00) Dollars (incl.) additional premium paid, and the payment of such further additional premiums as may become due under this contract, and the stipulations herein named, the Oregon Automobile Insurance Company does hereby insure Houk Motor Co., Redmond Motor Co., and Redmond Tractor Co. for an amount not exceeding Two Thousand and No/100ths ($2,000.00) Dollars on vehicles while on, in and/or towed by the equipment described herein or while in the care or custody of the assured, provided the assured may be held legally liable therefor.

This insurance shall apply from the 1st day of October, 1949, to the 1st day of October, 1950, 12:01 a.m., unless cancelled by the Company or the assured.

The total loss or damage to property of any person or persons other than the assured arising from any one occurrence, shall be considered in the aggregate as constituting one claim and from the total amount so determined the sum of One Hundred and No/100ths ($100.00) Dollars shall be deducted and this Company shall be liable only for loss or damage in excess of that amount, not exceeding the limits of liability named in the Policy.

Perils Insured Against—Against loss or damage directly caused by:

(a) Fire, including self ignition and internal explosion of the conveyance, and lightning.

(b) Cyclone; tornado; and flood (meaning rising navigable water).

(c) Collision, upset and/or overturn of the vehicle while being towed or conveyed.

(d) Marine perils while on ferries.

Perils Not Insured Against

This policy does not insure:

1. Loss or damage caused by neglect of the assured to use all due diligence to save, preserve and protect the property in his or their custody at and after any disaster insured against.

2. Loss or damage to goods or property by rough handling or due to poor packing, nor for loss of liquids by leakage and/or breakage unless directly caused by perils insured against.

3. Loss or damage to goods or property by reason of inherent vice, delay, wet, dampness, discolored, rusted, frosted, rotted, soured, steamed or contact with other goods or property unless the same is the direct result of a peril insured against.

4. Liability of the assured except to the legal owners of goods or property in his or their custody.

5. Loss or damage to the conveying truck and equipment used in connection with the truck, tarpaulins, fittings or goods or property carried gratuitously or as an accommodation.

6. Live stock except against accident causing death or rendering death necessary in consequence of any of the perils insured against.

7. Loss occasioned by pilferage, or theft.

8. Against loss or damage to the property insured hereunder while located:

(a) In or on the premises of the Assured,

(b) In any garage or other building where the truck or trucks herein described are usually kept.

9. Against loss or damage occasioned by war, invasion, hostilities, rebellion, insurrection, confiscation by order of any government, public authority, or risk of contraband or illegal transportation or strikers, rioters, locked-out workmen or persons taking part in labor disturbances or civil commotions.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co. & Redmond Tractor Co.

/s/ A. M. EPPKIN,
President.

Countersigned at Bend, Oregon, this 1st day of October, 1949.

LUMBERMEN'S INSURANCE AGENCY,

By /s/ WARD H. COBLE,
Agent.

Endorsement No. 5
Hoist Collision Endorsement

It is hereby understood and agreed that this Policy is extended to cover any actual loss by reason of injury to or destruction of (a) any hoist for which premium has been charged hereunder, (b) any property of the Insured, and (c) the premises, or any part thereof, in which the hoist is located (provided the insured is the owner of such premises, or is liable for such damage or destruction) is caused solely and directly by a collision of such hoist or anything carried thereon with any other object, except (1) loss of use; (2) any loss due directly or indirectly to fire, (3) any loss due directly to the breaking, burning out or disruption thereof.

Limit of liability hereunder not to exceed $1,-000.00.

In all other respects this policy will cover as per the printed conditions and stipulations embodied therein.

Attached to and forming part of Policy No. 332583 of the Oregon Automobile Insurance Company, of Portland, Oregon, issued to Houk Motor Co., Redmond Motor Co. & Redmond Tractor Co.

/s/ A. M. EPPKIN,
President.

Countersigned at Bend, Oregon, this 1st day of October, 1949.

LUMBERMEN'S INSURANCE AGENCY,

By /s/ WARD H. COBLE,
Agent.

OREGON AUTOMOBILE INSURANCE CO.
PUBLIC LIABILITY AND PROPERTY DAMAGE
OREGON UNIFORM ENDORSEMENT -- AUTOMATIC COVERAGE

The policy to which this endorsement is attached is an automobile bodily injury liability and property damage liability policy, and is hereby amended to compliance by the named insured, as a motor carrier of passengers or property with appropriate provisions of the Motor Transportation Act of Oregon, as d, and the pertinent rules and regulations of the Commissioner of Public Utilities of Oregon, promulgated in accordance with the provisions of the Motor ortation Act of Oregon.

In consideration of the premium stated in the policy to which this endorsement is attached, or becomes a part, when duly countersigned, the company hereby to pay any final judgment recovered against the named insured for bodily injury to or the death of any persons or loss of or damage to property of others ling injury to or death of the named insured's employees while engaged in the course of their employment, and loss of or damage to property owned or oper- or in the care, custody or control of the named insured, and property transported by the named insured, designated as cargo, and to any obligation for he named insured may be held liable under any Workmen's Compensation Law), resulting from the negligent operation, maintenance, ownership, or use of vehicles under permit issued to the named insured by the Commissioner of Public Utilities of Oregon, or otherwise under the Oregon Motor Transportation thin the limits of liability hereinafter provided, regardless of whether such motor vehicles are specifically described in the policy or not. It is understood and that upon failure of the company to pay any such final judgment recovered against the named insured, the judgment creditor may maintain an action in art of competent jurisdiction against the company to compel such payment. The bankruptcy or insolvency of the named insured shall not relieve the company of its obligations hereunder. The liability of the company extends to such losses, damages, injuries, or deaths whether occurring on the route or in the y authorized to be served by the named insured or elsewhere, within the State of Oregon, but as respects this endorsement only while operating under the ons of the Motor Transportation Act of Oregon.

The liability of the company on each motor vehicle for the following limits shall be a continuing one notwithstanding any recovery hereunder, in the ng minimum amounts:

ype of Motor Vehicle	BODILY INJURY Limit for Each Person	LIABILITY Limit for Each Accident	PROPERTY DAMAGE LIABILITY Limit for Each Accident
notor vehicle authorized for use in the transportation of property	$5,000	$10,000	$5,000
motor vehicle authorized for use in the transportation of persons, having passenger seating pacities as follows:			
12 passengers or less	5,000	10,000	5,000
13 to 20 passengers	5,000	15,000	5,000
20 passengers or more	5,000	20,000	5,000

Nothing contained in the policy or any endorsements thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the insured, shall relieve the company from liability hereunder or from the payment of any such final judgment, but as respects any equipment of the named in while being operated by others under an interchange of equipment agreement or requirement, the insurance afforded by this policy shall be excess over an valid and collectible insurance available to the named insured.

In consideration of the attachment of this endorsement, it is agreed that any provision in the policy to which this endorsement is attached extending th s of this insurance to any person, firm, or corporation other than the insured named therein is hereby declared null and void and in lieu thereof it i that the unqualified words "named insured" wherever used in this endorsement include the named insured, his or its employees while acting within the scop h employment and also any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such.

The named insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breac terms of the policy, and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agree contained in this endorsement.

Cancellation of this endorsement or of the policy to which it is attached may be effected by the company or the named insured giving not less than 1 notice in writing to the Commissioner of Public Utilities of Oregon at his office in Salem, Oregon, said notice to commence to run from the date notice i y received at the office of said Commissioner.

Attached to and forming part of Policy No. 332583 issued by the Oregon Automobile Insurance Company (Herein called company) of Portland, Oregon

Redmond Motor Co., Redmond Tractor Co., and Houk Motor Co. of Redmond, Oregon

at Portland, Oregon, this 4th day of October, 19 49

LICENSED INSURANCE AGENCY

Countersigned by BY

Authorized Company Representative

PUC Form MP 943.

OREGON UNIFORM ENDORSEMENT — CARGO

The policy to which this endorsement is attached is a cargo policy, and is hereby amended to assure compliance by the insured, as a common carrier or a contract carrier of property by motor vehicle, with the Motor Transportation Code and amendments thereto, with reference to making compensation to shippers or consignees for all property belonging to shippers or consignees coming into the possession of such carrier in connection with its transportation service, and with the pertinent rules and regulations of the Public Utilities Commissioner.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby agrees to pay, within the limits of liability hereinafter provided, any shipper or consignee for all loss of or damage to all property belonging to such shipper or consignee, and coming into the possession of the insured in connection with its transportation service, for which loss or damage the insured may be held legally liable, regardless of whether the motor vehicles, terminals, warehouses, and other facilities used in connection with the transportation of the property hereby insured are specifically described in the policy or not. The liability of the Company extends to such losses or damages whether occurring on the route or in the territory authorized to be served by the insured or elsewhere.

Within the limits of liability hereinafter provided it is further understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement by the insured, shall affect in any way the right of any shipper or consignee, or relieve the Company from liability for the payment of any claim for which the insured may be held legally liable to compensate shippers or consignees, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the Company. The insured agrees to reimburse the Company for any payment made by the Company on account of any loss or damage involving a breach of the terms of the policy and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

The liability of the Company for the limits provided in this endorsement shall be a continuing one notwithstanding any recovery hereunder. The Company shall not be liable for an amount in excess of $2,000, in respect of any loss of or damage to or aggregate of losses or damages of or to the property hereby insured occurring at any one time and place, nor in any event for an amount in excess of $1,000, in respect of the loss of or damage to such property carried on any one motor vehicle, whether or not such losses or damages occur while such property is on a motor vehicle or otherwise.

This policy, which includes the provisions of this form, shall not be cancelled or otherwise terminated at any time prior to its expiration until the insurer which issued same shall have filed a written notice of cancellation with the Public Utilities Commissioner of the State of Oregon, and thereafter said policy shall be cancelled upon the expiration of 15 days from the receipt of such notice, provided, however, that such cancellation shall not discharge the insurer from any liability which has and thereafter may accrue under the provisions of this policy prior to the date of such cancellation, and that no agreement between the insurer and the insured shall operate to void any of the conditions of these restrictions upon cancellation; and provided further, that any warranties or statements made by the insured to either or both the insurer and the Public Utilities Commissioner of the State of Oregon, either with respect to the issuance of this policy or any liability which may accrue under its provisions subsequent to the issuance thereof, or the giving by the Public Utilities Commissioner of any extension of time to the insured in which to comply with any of the provisions of the Motor Transportation Code of the State of Oregon, or any other forbearance on the part of either the Public Utilities Commissioner, or the insured to the Public Utilities Commissioner, shall not in any way release the insurer from its liability under this policy, notice to the insurer of any such alteration, extension or forbearance being hereby waived.

Attached to and forming part of policy No. 332583 issued by the Oregon Automobile Insurance Co.

(herein called Company) of Portland, Oregon, to Redmond Motor Co., Redmond Tractor Co., & Houk Motor Co.

of Redmond, Oregon

Dated at Portland, Oregon, this 4th day of October, 19 49

Countersigned by LUMBERMENS INSURANCE AGENCY

BY _____

Authorized Company Representative.

ENDO. ENT NO. 1.

AUTOMOBILE ..LERS AND/OR AUTOMOBILE REPAIR SHOP AND/OR AUTOMOBILE STORAGE GARAGE AND/OR AUTOMOBILE SERVICE STATION ENDORSEMENT

This policy covers the total hazard of the assured named in the policy for public liability and property damage as defined and limited herein, and the premium is based upon an estimated annual payroll of $ (a) $10,000. (b) $20,000. (c) $60,000. as herein defined—rates per $100.00 of payroll being:

Public Liability ..... (a) .106 (b) 1.29 (c) .412

Property Damage ..... $ (a) .04 (b) .56 (c) .18

PUBLIC LIABILITY:

Injuries, including death any time resulting therefrom, accidentally sustained by any person or persons not employed by the assured, on or about the premises described in the policy and caused by the operations of the assured as described therein; this policy also covers injuries arising out of and in connection with the business of the assured, sustained by any person or persons not employed by the assured, elsewhere than on the premises of the assured and caused by or resulting from the operation or maintenance and use of any automobile covered under this policy.

PROPERTY DAMAGE:

Damage to or destruction of property of any kind, on or about the premises described in the policy and caused by the operations of the assured as described herein; this policy also covers damage to or destruction of property arising out of and in connection with the business of the assured elsewhere than on the premises of the assured and caused by or resulting from the operation or maintenance or use of any automobile covered under this policy; provided, however, that the company's liability is limited to the actual value of the property destroyed at the date of its destruction, or the actual cost of suitable repair of the property injured, and for damage resulting from loss of use of the property injured or destroyed, but in no event shall the total indemnity for both loss of use and damage to property be in excess of the property damage limits specified in this policy.

Provided, that this section does not cover the property of the assured, or property in the custody of the assured, or property which is rented or leased and for which the assured is legally responsible, either on or away from the premises of the assured, and not property carried in or upon any automobile of the assured, or upon any automobile in the custody of the assured, either on or away from the premises of the assured.

It is further provided that the Additional Assured Clause in the policy to which this endorsement is attached is hereby deleted.

OPERATIONS COVERED:—Described in Policy Warranty No. 1 as—

(1) *Automobile Dealers and Repair Shops*
All work necessary to the conduct of the named assured's business including the operation of all motor vehicles and trailers in such business and if automobiles owned by the named assured, for pleasure use.

(2) *Automobile Storage Garages and Service Stations*
All work necessary to the conduct of the named assured's business including the operation of motor vehicles and trailers in such business except the possession, consumption or use, elsewhere than upon the premises herein designated of any article manufactured, sold or distributed by the insured; and the operation of any motor vehicle or trailer which is
(a) owned in whole or in part by the named assured or by the individual partners if the named assured is a partnership
(b) hired or leased by the named assured
(c) registered in the name of the named assured.

EXCLUSIONS:

This company shall not be liable under this policy for:
(1) renting or hiring motor vehicles or trailers to others:
(2) carrying of goods or materials for others except such transportation of goods or materials for prospective purchasers as is incidental to the sale of motor vehicles or trailers:
(3) motor vehicles or trailers owned or hired by the assured and used as haulaways for the conveyance of new motor vehicles, or for the wholesale or retail delivery of fuel oil or for the wholesale delivery of gasoline:
(4) accidents arising from the ownership, maintenance or use for pleasure purposes of any automobile not owned by or in charge of the named insured for use principally in such operations:
(5) accidents caused by aircraft or watercraft:
(6) accidents caused by any escalator or elevator, its car or platform or by the shaft or hoistway within which it is operated or by any of the appliances used in the operation thereof:
(7) accidents caused by any mechanical or hydraulic hoist used in raising or lowering automobiles or other material from one floor, balcony or platform to another:
(8) accidents caused by structural alterations in making additions to, or the construction or demolition in whole or in part of any building, structure, elevator, mechanical or hydraulic hoist:
(9) any liability of the insured to any employee of the insured while engaged in the business of the insured, or under any workmen's compensation law, plan or agreement:
(10) injury to or destruction of property owned by, rented to, in charge of or transported by the insured:
(11) any liability assumed by the insured under any contract or agreement:
(12) any partner, if the named insured is a partnership, with respect to any automobile owned by such partner or by any other partner of the named insured or by a member of the family of any such person; or, if the named insured is an individual, to any automobile owned by a member of the named insured's family:

PAYROLL OF THE ASSURED:

The premium for this insurance is based (a) on the entire remuneration, including commissions, bonuses and other compensation earned during the policy period by all employees of the named insured engaged in the declared operations except that remuneration of salesmen and general managers is to be included on the basis of a fixed amount of $2,000 per annum for each salesman and general manager and (b) on the remuneration earned during the policy period by the proprietor or proprietors, if the named insured is an individual or partnership, and by the president, any vice-president, secretary, treasurer and any other executive officer active in the defined operations, if the named insured is a corporation, on the basis of a fixed amount of $2,000 per annum for each such proprietor or executive officer.

MINIMUM PREMIUM:

The assured shall, if requested by this Company or its authorized representative, render a sworn statement showing the total amount of all salaries and wages as indicated by their payroll for the term covered by this policy at any time subsequent to the expiration of same. It is also agreed that this Company or its authorized representative shall be permitted access to the books and/or payroll reports of the assured at any time within one year from date of expiration of this policy for the purpose of auditing the payroll of the assured during the term of this policy.

If such payroll report, submitted by assured or determined by an audit, shall be greater in amount than the estimated payroll upon which the premium paid for this policy was based, then the assured shall pay such additional premium as has been earned on the excess amount of such actual payroll. If such payroll is actually less than estimated payroll then this Company shall refund to assured the amount of unearned premium, except that this Company reserves the right to retain a minimum premium of $70.21 as an earned premium under this policy regardless of amount of payroll expended or time this policy was in force.

INSPECTIONS:

The Company shall be permitted at all reasonable times to inspect the premises described herein and the automobiles covered by this policy.

Attached to and forming part of Policy No. 332583

OREGON AUTOMOBILE INSURANCE COMPANY.

Dated at Bend, Oregon October 1st, 1949

COUNTERSIGNED BY INSURANCE AGENCY

BY [illegible]
Agent.

PRESIDENT

FORM 125 8 36313 8

Admitted March 19, 1951.

Mr. Phillips: As to those exhibits, your Honor, the paragraphs in the policies that we are interested in are in the United States Fidelity and Guaranty Policy Paragraph No. 5 and Paragraph No. 10, those two paragraphs. Paragraphs 5 and 10 in Exhibit 1.

Mr. Kester: In our policy, Paragraph 11 on the second page and at the top of the third page, the paragraph headed "Other Insurance." However, I would say this: That while I agree generally that the language of those clauses will be determinative, I would not want the Court to feel we were limiting his consideration to those clauses, because it is necessary to read those clauses against the background of the rest of the policy. I think it is necessary, in order to interpret those clauses, to do so in the light of the remainder of the policy. But I think the basic problem will arise under the clause in each policy headed "Other Insurance."

The Court: I am going to accept the pre-trial order and sign it, it having been approved by all the parties, with the understanding that we will take up first the legal liability, and in the event that a decision adverse to the plaintiff is rendered on the law we will then set the matter down for further hearing on the question of estoppel, with leave of plaintiff and defendant Oregon Automobile Insurance Company to apply for leave to amend the pre-trial order. Is that satisfactory?

Mr. Phillips: That is satisfactory. [7]

Mr. Kester: Yes.

(Thereupon the matter was argued to the Court by counsel, the Court took the matter under advisement, and thereafter, on March 28, 1951, the Court rendered its Oral Opinion, as follows:)

The Court: In the case of United States Fidelity and Guaranty Company, Plantiff, vs. Oregon Automobile Insurance Company, et al., Defendants, Civil 5890, I find that the automobile liability policy issued by defendant to Oregon Auto Insurance Company is the primary insurance and creates liability up to its policy limits. The policy issued by the plaintiff is excess to that of the policy written by Defendant Oregon Auto.

Defendant Oregon Auto is therefore liable for the payment of the judgment recovered in the State Court by Beulah Morris against Defendant Raymond Suter, in the sum of $7,360.00, plus costs and interest.

Defendant Oregon Auto under its policy is likewise required to defend the action filed in the State Court by Defendant William Morris for personal injury, property damage, and loss of consortium by reason of the injuries to his wife Beulah Morris.

As to the other issues in the case, I will receive any evidence that the parties desire to introduce and will hear argument on Monday, April 2, 1951, at 2:00 o'clock p.m.

(Thereupon proceedings in the above matter were adjourned until Monday, April 2, 1951, at 2:00 o'clock p.m.) [8]

April 2, 1951

Proceedings in the above matter were resumed, pursuant to adjournment, as follows:

Appearances:

W. K. PHILLIPS, and
ALBERT M. HODLER,
Of Attorneys for Plaintiff;

RANDALL B. KESTER, and
HOWARD K. BEEBE,
Of Attorneys for Defendants Oregon Automobile Insurance Company, Houk Motor Company, and Redmond Motor Company;

HARRY F. SAMUELS,
Of Attorneys for Defendants William Morris and Beulah Morris.

The Court: Mr. Phillips, why are you entitled to any attorney's fee for defending this action?

Mr. Phillips: I think I am entitled to attorney's fees under the Oregon Statutes and under the equitable jurisdiction of this Court, both.

The Court: I am talking about reimbursement for the actions that you defended.

Mr. Phillips: The attorney's fee to Brewster and the attorney's fee to myself?

The Court: Yes.

Mr. Phillips: Those are incidental expenses that we expended for the use and benefit of the Oregon

Auto [9] because they refused to comply with their contract. We were acting as the agents of Suter.

The Court: Did you tender the defenses to Oregon Auto?

Mr. Phillips: Yes, your Honor.

The Court: Before you incurred any expenses?

Mr. Phillips: I don't recall whether it was before or not. As I understand it, the Oregon had already investigated the accident before my company knew anything about it. They had been corresponding back and forth, and when this case came up down at Salem—I don't recall. I have letters on the tender, though, your Honor.

The Court: Under your policy aren't you required to defend whether or not you are liable?

Mr. Phillips: We are required to defend, yes, your Honor, but we are not required to defend for the Oregon. Under their policy they are required to defend.

The Court: You were representing your own insured, weren't you? You were defending for your own insured? That was your obligation under the policy, even though you were not liable?

Mr. Phillips: That was my obligation under the policy, yes, to defend if the Oregon did not. Under the Oregon's policy they were required to defend. Due to the fact they wouldn't defend, they refused to defend, then of course it became my liability to defend. Their policy provides the same thing, that they are to defend, and it was their duty to defend in this lawsuit. Due to the fact

that [10] they did not or would not defend, then we had to.

The Court: I think you were the one that cited me a case to the effect that although the company was not liable for the payment they denied recovery for reimbursement for expenses in the defense of the case on the ground that even though they were not liable for the payment they were required under their policy to defend.

Mr. Phillips: Yes, but I don't think that case was similar to this, your Honor, where there was a tender. There was nothing stated in that case, as I recall, as to the fact of a tender. I have numerous letters here that I would like to put in evidence on the trial where the tender and the denial was made. There is no question, as I view it, about the reasonableness or the services being rendered. At least they are agreed to in the pre-trial order, that the services were rendered and that the services were reasonable. So I won't go into either one of those questions.

The Court: All right. Go ahead and put on your case.

Mr. Kester: May it please the Court, before the taking of evidence may I take up a matter in connection with the pre-trial order. I take it that perhaps I should do it before he puts on evidence. The Court will recall that at the time of our last hearing we had a preliminary informal discussion about how the matter would be presented, and it was agreed that we would argue the legal questions and that after the Court had considered those legal

questions [11] if there were further issues then the pre-trial order might be amended in order to fully present the case.

At the discussion of the legal questions the Court raised a question with respect to whether automobile liability insurance is in its nature personal to a particular person or whether it involves a particular car. That apparently entered somewhat into the consideration and discussion. That was, in fact, one of the questions argued. As I understand it, under the Federal Rules when an issue is presented to the Court to consider then the pre-trial order or the pleadings, whatever may be necessary, may be amended so as to include that issue.

I would like to present as a proposed amendment to the pre-trial order the following contention, which would be Contention No. 12 of the defendants Oregon Automobile Insurance Company, Houk Motor Company and Redmond Motor Company, and would appear at the bottom of Page 8 of the pre-trial order:

"The defendants Houk Motor Company, Redmond Motor Company, and Oregon Automobile Insurance Company contend that in the business of automobile liability insurance generally and as carried on by the defendant Oregon Automobile Insurance Company in particular, when separate policies exist covering the driver and the car, the insurance on the driver is considered primary and that on the car is considered secondary, and in computing rates for liability insurance such rates are

based on the risks [12] arising from the particular driver and have no relation to the particular kind of car being driven."

There would be a corresponding issue, your Honor, under the questions to be decided. Now that contention is, obviously, a mixed question of law and fact, and at the appropriate time here I would offer evidence in support of this contention.

Mr. Phillips: I object to that, if the Court please, to that amendment, on the ground and for the reason that that issue has already been determined on another ground. These policies have been construed. Now what he is trying to do is to reopen that determination that your Honor has already arrived at. I don't think that has any place in here at all, nor am I prepared to argue that, nor do I intend to argue those issues. He had the opportunity to bring that in fully and completely.

The Court: Your application is denied.

Mr. Kester: May I have an exception?

The Court: I have decided that question already. You may have an exception.

Mr. Kester: May I particularly point out that one of the reasons offered for the amendment is the fact that this question was presented to and considered by the Court, and under the rules, therefore, it is proper to incorporate it as an issue in the pre-trial order.

The Court: For the record I will state that in determining [13] the problem I did it on the basis of the adjudicated cases, and that was not an issue.

Mr. Kester: I will at the appropriate time ask

for leave to make an offer of proof in that regard.

The Court: All right.

Mr. Phillips: I don't know, your Honor, whether these letters have been given a proper numbering in the pre-trial order or not. I have a letter here dated September 5, 1950, or a copy of a letter, rather, written to Oregon Automobile Insurance Company by myself.

The Court: I don't even have the pre-trial order here. Are the copies of the pre-trial order identical with the original?

Mr. Phillips: I presume they are, your Honor.

The Court: I have a copy here, but I don't know if it is the same.

Mr. Kester: There has been no change in it, as far as I know, except that there was one exhibit added. No. 23 has been added.

Mr. Phillips: There is quite a number of those exhibits, your Honor, that are now unnecessary as far as the questions to be determined are concerned.

The Court: On the question of estoppel?

Mr. Phillips: That is correct.

The Court: No. 11, copy of letter dated September 5, 1950, [14] written by W. K. Phillips to Oregon Automobile.

Mr. Phillips: That is correct, your Honor. I would like to have it marked as No. 11.

Mr. Kester: Is this being offered in evidence now?

Mr. Phillips: Yes.

Mr. Kester: If the Court please, first may I ask

for what purpose that is being offered in evidence?

Mr. Phillips: On the question of the tender, your Honor, and the rejection by the Oregon.

Mr. Kester: As offered for that purpose, your Honor, we object to it on the ground and for the reason that Mr. Phillips, either individually or as attorney for the U. S. Fidelity and Guaranty Company, had no authority to make any tender on behalf of Raymond Suter, the person who was the defendant in the action brought in Deschutes County. I believe this one refers to the action in Marion County. Mr. Phillips had no authority to make any such tender, and this letter does not in fact constitute such a tender.

(Copy of letter dated September 5, 1950, W. K. Phillips to Oregon Automobile Insurance Company, was thereupon marked Plaintiff's Exhibit 11.)

PLAINTIFF'S EXHIBIT No. 11

September 5, 1950.

Oregon Automobile Insurance Company,
Equitable Building,
Portland, Oregon.

Re: Policy No. 332583
Morris vs. Redmond Motor Co.

Gentlemen:

As you have heretofore been advised on numerous occasions, the action under this policy, which

you are carrying on the Redmond Motor Company, instituted by Beulah Morris against Raymond Suter, et al., in Deschutes County, has been brought against Raymond Suter and James Stuchlik in Marion County, Oregon.

We are representing Mr. Suter due to your failure to do so by virtue of the fact that we have been employed by the U. S. Fidelity & Guaranty Co. We understand that your policy, hereinabove particularly numbered, covered Mr. Suter when the accident, over which this litigation arose, occurred.

The U. S. Fidelity & Guaranty Co. has kept you fully advised at all times of its contentions in this matter as to the coverage, and particularly that they consider their policy on Mr. Suter as excess coverage over and above the amount which you are carrying on Redmond Motor Company and Mr. Suter.

Of even date herewith we are filing in the Marion County action a general denial and plea in abatement, together with a motion for a change of venue from Marion County to Deschutes County, Oregon. We are doing this simply for the purpose of protecting Mr. Suter in order that no default will be taken against him. As a representative of the U. S. Fidelity & Guaranty Co. I do and do hereby tender to you the defense of this action in Marion County, namely, Beulah Morris vs. Raymond Suter and James Stuchlik, and demand that you forthwith and immediately take over the defense of this action for the benefit of Raymond Suter. In the event that you do not do so, then, of course, the

U. S. Fidelity & Guaranty Co., through us, will continue to defend Mr. Suter, and will look to you for payment of any and all judgments that may or might be taken against him by the plaintiff, Beulah Morris, and will further hold you responsible for all costs and attorneys' fees involved in this defense.

If we do not hear from you on or before the 15th day of September, 1950, advising that you accept the defense of this cause under your coverage, then we will take it for granted that you are refusing Mr. Suter coverage and will act accordingly.

Very truly yours,

PHILLIPS, HODLER & SANDEBERG,

By .....,
Attorney for U. S. F. & G. Co.

WKP:dr.

Mr. Phillips: Exhibit 12, your Honor, is a letter written by Mr. Kester to the United States Fidelity and Guaranty Company [15] in answer to the previous letter.

The Court: I am not going to rule on them now, Mr. Phillips.

Mr. Phillips: Oh, certainly not.

The Court: Go ahead.

Mr. Kester: An objection in so far as the same reasons would apply based on the letter to which this is an answer.

(Letter dated September 12, 1950, Randall B. Kester to U. S. Fidelity and Guaranty Company, was marked Plaintiff's Exhibit No. 12.)

PLAINTIFF'S EXHIBIT No. 12

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

September 12, 1950

U. S. Fidelity & Guaranty Co.
c/o Phillips, Hodler & Sandeberg,
1208 Public Service Bldg.,
Portland 4, Oregon.

Re: Morris v. Houk Motor Co. et al.,
(Deschutes County)

Morris vs. Suter and Stuchlick
(Marion County)

Gentlemen:

Your letter of September 5, 1950, addressed to Oregon Automobile Insurance Company, has been referred to this office for answer.

As we understand the situation, Beulah Morris brought an action in Deschutes County against Houk Motor Co., Raymond Suter and James Stuchlik arising out of the accident of October 15, 1949. In that action, Oregon Automobile Insurance Company is representing Houk Motor Co., through Cunning & Brewster, attorneys of Redmond. Mr.

Brewster also appeared in that action on behalf of Suter, who had already consulted him individually on matters arising out of this accident.

While the Deschutes County action was still pending, plaintiff brought another action in Marion County, arising out of the same accident, against Suter and Stuchlik only, not making the garage a defendant. Suter did not notify Oregon Auto of the bringing of that action, did not forward the summons and complaint to it, and did not request Oregon Auto to defend him in that action. Instead he apparently forwarded the suit papers to U.S.F.&G., and you have appeared for him on behalf of U.S.F.&G. While Oregon Auto had learned through other sources of the bringing of the Marion County action, your letter of September 5, 1950, was the first time anyone has requested it to appear on behalf of Suter in that action.

The policy of Oregon Automobile Insurance Company provides, among other things, that "any additional Insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy." The policy of Oregon Auto insures Houk Motor Company, and any rights Suter might have under that policy would be only as an additional insured. Since the U.S.F.&G. policy, in which Suter is the named insured, is other valid and collectible insurance applicable to this claim, it appears that Suter is not covered by the Oregon Auto policy with respect to this claim, and that his defense is the responsibility of U.S.F.&G. Co.

However, since you have requested Oregon Auto

to take over the defense of Suter in the Marion County action, we wish to advise you that Oregon Automobile Insurance Company is willing to take over that defense, upon the understanding that by doing so it does not admit any liability under its policy either to Suter or the U.S.F.&G. Co., and does not waive, surrender or in any way affect any of its rights or defenses under its policy, with respect to either Suter or the U.S.F.&G. Co. In other words, if Oregon Auto assumes this defense, whatever rights any of the parties may have with respect to either of the policies will be fully preserved, without prejudice, until after the conclusion of the litigation, at which time the effect of the respective policies can be determined. At that time, Oregon Automobile Insurance Company will expect to hold U.S.F.&G. responsible for all sums expended on behalf of Suter, whether by way of judgment, settlement, costs, expenses, attorneys fees, or otherwise.

If the foregoing non-waiver agreement is satisfactory you may forward the pleadings in the Marion County case to us.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By /s/ RANDALL B. KESTER,
Attorneys for Oregon Auto.
Ins. Co.

RBK/mm

cc—Cunning & Brewster
Redmond, Oregon

cc—Ray Suter
Box 422, Redmond, Ore.
cc—U. S. Fidelity & Guaranty Co.
Cascade Building, Portland
cc—Oregon Automobile Ins. Co.
Equitable Building, Portland.

Mr. Phillips: No. 13, your Honor, is a copy of a letter. Have you any objection to copies?

Mr. Kester: No.

Mr. Phillips: Or would you rather provide the originals?

Mr. Kester: No, none whatever.

Mr. Phillips: Do you require any further identification?

Mr. Kester: No, I will admit the sending and receipt of the letter.

Mr. Phillips: Copy of letter of September 20, 1950, concerning the same thing.

(Copy of letter dated September 20, 1950, W. K. Phillips to Randall B. Kester, was marked Plaintiff's Exhibit 13.)

PLAINTIFF'S EXHIBIT No. 13

September 20, 1950.

Maguire, Shields, Morrison & Bailey,
Attorneys at Law,
723 Pittock Block,
Portland 5, Oregon.

Attention: Mr. Randall B. Kester.

Re: Morris v. Houk Motor Co. et al.
(Deschutes County)

Morris v. Suter and Stuchlik
(Marion County)

Dear Sir:

Your answer to my letter of September 5, 1950, has been read with interest. In so far as the Oregon Automobile Insurance Company accepting the defense of these actions under a non-waiver, the U. S. Fidelity & Guaranty Company advises you that it has no interest in that and again demands that Oregon Automobile Insurance Company assume all liability under its policy, in so far as Mr. Raymond Suter is concerned, and afford him a full and complete defense without limitations or qualifications. If you will review the file of the Oregon Automobile Insurance Company, you will find that it has been continuously advised in this matter. I do not have your policy but from general knowledge of policies of this kind. I would conclude that the phrase contained in your letter is inconsistent with the rest of the coverage, or at least ambiguous.

How this phrase could possibly affect the plaintiff's right of action against the Oregon or her privilege of garnishment under a judgment, borders on the inconceivable.

Further, I see no reason why that phrase should in any way affect the right of contribution.

The policy carried by Mr. Suter with the U. S. Fidelity & Guaranty Company in part reads:

> "The insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to said automobiles or otherwise."

If there is no primary coverage, then, of course, there is no excess insurance and Mr. Suter has no coverage under the U. S. Fidelity & Guaranty Company's policy issued to him.

U. S. Fidelity & Guaranty Company again demands that your client, Oregon Automobile Insurance Company, accept the defense and liability of the above named cases under its policy.

Very truly yours,

PHILLIPS, HODLER & SANDEBERG,

By .....

WKP:dr.

Mr. Kester: We will object to that letter on the ground and for the reason that it is nothing but an argument, and [16] constitutes no evidence one way or the other as far as the case is concerned.

Mr. Phillips: It is part of the correspondence, your Honor, on the same matter.

Next is a letter dated November 7, 1950, written by myself to Maguire, Shields, Morrison & Bailey, Attention Mr. Randall Kester. That is Exhibit No. 14.

Mr. Kester: So far as that is offered as purporting to be a tender we will object to it. Also, on the ground that it is not such a tender; that neither the U. S. F. & G. nor Mr. Phillips had authority to make any such tender on behalf of Raymond Suter; and, furthermore, as to this and also the ones that were previously mentioned, any tender that they might constitute would come too late because at that time the cases were already pending and the U. S. F. & G. had already undertaken the defense, and that none of the original suit papers were ever submitted to the Oregon Automobile Insurance Company.

(Copy of letter dated November 7, 1950, W. K. Phillips to Maguire, Shields, Morrison & Bailey, was thereupon marked Plaintiff's Exhibit 14.)

PLAINTIFF'S EXHIBIT No. 14

November 7, 1950.

Maguire, Shields, Morrison & Bailey,
Attorneys at Law,
Pittock Block,
Portland, Oregon.

Attention: Mr. Randall Kester.
Re: Morris vs. Suter & Stuchlik.

Dear Sir:

As you have heretofore been advised, we represent the U. S. Fidelity & Guaranty Company, and are writing for them. As you know, we represented the defendant, Suter, in the case filed in Marion County. The defense of that case was tendered to you and you failed to accept the responsibility therefor. That case has now been abandoned and the one in Deschutes County has been revived and will be tried on the 20th day of November, 1950. I am at this time formally tendering you the defense of the case in Deschutes County, known as Morris vs. Suter, et al., Numbered, I believe, 7784. The U. S. Fidelity & Guaranty Company believes that you have coverage for Mr. Suter, one of the defendants, as well as the motor company, and insists that you accept the responsibility for the defense of that cause for him, and also the liability, if any, for any and all judgments that may or might be rendered against him. In the event that you do not do so, then, of course, the U. S. Fidelity & Guaranty Company will look

to you for payment of any and all judgments that may or might be taken against Mr. Suter by the plaintiff, Beulah Morris, and will further hold you responsible for all costs and attorneys fees involved in this defense.

Your immediate advices as to whether or not you will accept these responsibilities will be greatly appreciated.

Very truly yours,

PHILLIPS, HODLER & SANDEBERG,

By .....

WKP:dr.

Mr. Phillips: No. 15, letter dated November 9, 1950, written by Mr. Kester to myself.

Mr. Kester: The same point that I made would apply to that.

(Letter dated November 9, 1950, Randall B. Kester [17] to W. K. Phillips, was marked Plaintiff's Exhibit 15.)

PLAINTIFF'S EXHIBIT No. 15

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

November 9, 1950.

Phillips, Hodler & Sandeberg
Attorneys at Law
Public Service Building
Portland, Oregon

Attention: Mr. Phillips
Re: Morris v. Suter et al.

Gentlemen:

This will acknowledge receipt of your letter of November 7, 1950. In tendering to us the defense of the action in Deschutes County, we presume that you intended to tender the defense to the Oregon Automobile Insurance Company, which we represent.

As we previously advised you, in connection with the action brought in Marion County, the policy of the Oregon Automobile Insurance Company provides, among other things, that "Any additional insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy." In another portion of the policy, the same result is indicated by the provision that "This company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and

collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy."

We understand that the United States Fidelity & Guaranty Co., which you represent, has a policy of liability insurance covering Mr. Suter, which is other valid and collectible insurance applicable to this claim. It therefore appears that Suter is not covered by the Oregon Automobile Insurance Company policy with respect to this claim, and that his defense is the responsibility of the U. S. F. & G. Co. We understand that U. S. F. & G. Co. has already assumed the defense of Mr. Suter, through attorney George Brewster, and Mr. Brewster also represents the Oregon Automobile Insurance Company in defending Houk Motor Company, its named insured.

The Oregon Automobile Insurance Company denies any and all liability under its policy with respect to Mr. Suter, and respectfully declines your tender of the defense of Mr. Suter.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By /s/ RANDALL B. KESTER,
Attorneys for Oregon Automobile Insurance Company.

RBK/mm

cc—Ray Suter
Box 422, Redmond, Oregon

cc—U. S. Fidelity & Guaranty Co.
Cascade Building, City
cc—Oregon Automobile Ins. Co.
Equitable Building, City
cc—Cunning & Brewster
Attorneys at Law, Redmond, Ore.

Mr. Phillips: Have you got that letter from Suter to you?

Mr. Kester: Yes.

The Court: You are offering No. 16 now?

Mr. Phillips: No. 16, yes, your Honor. That is the original.

The Court: What is the objection to this one, Mr. Kester?

Mr. Kester: No objection, except that it is not a tender. It doesn't purport to be.

The Court: You object to the introduction?

Mr. Kester: First, for what purpose is it offered?

Mr. Phillips: To show that the Oregon was given the opportunity and that demands were continuously made on the Oregon to defend these cases, and that the defenses were tendered to them a half a dozen different ways after they had knowledge of the lawsuits.

Mr. Kester: As far as its being offered as proof of a tender, we will object to it on the ground that it does not on its face purport to be a tender, and it does not include with it nor has there ever been

submitted to Oregon Auto the original suit papers in any of these lawsuits.

Mr. Phillips: I don't think that is necessary, your Honor, after their denial——

The Court: All right.

(Letter dated November 16, 1950, Ray E. Suter to [18] Oregon Automobile Insurance Company, was marked Plaintiff's Exhibit 16.)

PLAINTIFF'S EXHIBIT No. 16

Redmond, Oregon
November 16, 1950.

Oregon Automobile Insurance Company
Equitable Building
Portland, Oregon

Gentlemen:

Re: Ray E. Suter and/or Lela Suter—
Loss: 10/15/49

I hereby request acknowledgment from you in reference to claim filed against me on the above captioned accident.

It is my understanding that the Oregon Automobile Insurance Company would be known as the primary insurance carrier, therefore owing to me a defense in litigation arising out of this accident.

Very truly yours,

/s/ RAY E. SUTER.

Mr. Phillips: Copy of letter from Mr. Kester to Ray Suter. That is No. 17.

The Court: The same objection?

Mr. Kester: The same thing.

(Copy of letter dated November 17, 1950, Randall B. Kester to Ray Suter, was marked Plaintiff's Exhibit 17.)

PLAINTIFF'S EXHIBIT No. 17

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

November 17, 1950.

Mr. Ray Suter
Redmond
Oregon

Re: Morris v. Suter et al

Dear Sir:

Your letter of November 16, 1950 addressed to the Oregon Automobile Insurance Company has been referred to this office for answer. You have already been sent copies of our letter to the U. S. Fidelity & Guaranty Co. dated September 12, 1950, and also our letter of November 9, 1950 to Phillips, Hodler & Sandeberg, attorneys for the U. S. Fidelity & Guaranty Co. The position of the Oregon Automobile Insurance Company is fully stated in those letters and we reaffirm that position at this time.

As we understand it, the U. S. Fidelity & Guaranty Co. had a policy of liability insurance covering you at the time of this accident, and that company has undertaken your defense in the present case through George Brewster. The policy of insurance which the Oregon Automobile Insurance Company had with respect to the Houk Motor Company does not apply to you in this situation and the Oregon Automobile Insurance Company has not and does not assume any responsibility with respect to your defense in the present case, or any judgment that may be recovered against you.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By RANDALL B. KESTER,
Attorneys for Oregon Automobile Insurance Company.

RBK:jmw

cc—W. A. Phillips
cc—U. S. Fidelity & Guaranty Co.
cc—Oregon Automobile Ins. Co.
cc—Cunning & Brewster

The Court: Are you offering 18 now?
Mr. Phillips: I will offer No. 18, your Honor.
The Court: All right. Any objection?
Mr. Kester: Same objection, your Honor.

(Copy of letter dated December 19, 1950, Joseph A. Boyce, Superintendent of Claims, to Oregon Automobile Insurance Company, was marked Plaintiff's Exhibit 18.)

PLAINTIFF'S EXHIBIT No. 18

Carbon Copy From
United States Fidelity and Guaranty Company
W. Talbot Sinclair, Manager
Portland 4, Oregon

December 19, 1950

Oregon Automobile Insurance Company
Equitable Building
Portland, Oregon

Gentlemen:

Re: 54-AL-2640—Ray E. Suter, Assured—
Accident 10-15-49

This letter is addressed to you for the express purpose of tendering to you the defense of the litigation, wherein Mr. Morris has instituted an action in Deschutes County against Raymond Suter, Houk Motor Company and James Stuchlik, defendants, arising out of the same automobile accident occurring on October 15, 1949, subject of prior correspondence, copies of which have been forwarded to your office.

Therefore, consider this letter a formal tender of the defense of this suit from this company to your company, such tender referring specifically to ap-

pearing or answering on behalf of defendant, Raymond E. Suter.

Yours very truly,

/s/ JOS. A. BOYCE,
Supt. of Claims.

JAB:hj

cc: Ray E. Suter, Redmond, Oregon
cc: Phillips, Hodler and Sandeberg—
Portland, Ore.

The Court: No. 19 would be the answer from Mr. Kester?

Mr. Phillips: Yes.

(Copy of letter dated January 9, 1951, Randall B. Kester to U. S. Fidelity and Guaranty Company, was marked Plaintiff's Exhibit 19.)

PLAINTIFF'S EXHIBIT No. 19

January 9, 1951

U. S. Fidelity & Guaranty Co.
1112 Cascade Building
Portland 4, Oregon

Re: Your No. 54-AL-2640
William Morris v. Suter, Redmond
Motor Company and Stuchlik.

Gentlemen:

Your letter of December 19, 1950 tendering to the Oregon Automobile Insurance Company the

defense of defendant Raymond Suter has been referred to this office for answer.

You have been previously advised, in connection with the case of Beulah Morris, arising out of the same accident, that the policy of the Oregon Automobile Insurance Company provides, among other things that "any additional insured who is covered by valid and collectible insurance against a claim also covered hereby shall have no right of recovery under this policy." The policy also provides "this company will not be liable if any other person, firm or corporation indemnified hereunder is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy."

We understand that the U. S. F. & G. has a policy of liability insurance covering Mr. Suter, and in Mr. Phillips' letter of December 4, 1950 to Mr. Brewster, a copy of which was sent to us, he states that yours is a $5,000 policy. We assume from that statement that your policy has limits of $5,000 with respect to injury to any one person, $10,000 with respect to injuries arising out of any one accident, and $5,000 with respect to property damage arising out of any one accident. We have been advised that the case of Beulah Morris against Suter and others, which was tried in Deschutes County in November, 1950, resulted in a judgment in the amount of $7,360.00 in favor of the plaintiff and against the defendant Suter.

To the extent that your policy is exhausted by

payments on the judgment of Beulah Morris, that policy would no longer be valid and collectible insurance of defendant Suter, and to that extent our exclusion would not be applicable. We understand that the present case, by William Morris, includes a claim for $1500.00 for personal injuries to William Morris, $250.00 for property damage for William Morris, and $7500.00 for loss of consortium arising out of the injury to Beulah Morris.

With respect to the first cause of action, for Mr. Morris' own personal injuries, and the second cause of action for his property damage, it would seem that your policy is applicable, and since the demand is within the limits of your policy, we can see no way in which either of those claims could come within the policy of Oregon Automobile Insurance Company. With respect to the claim for loss of consortium, it seems to us that this would be damage arising out of the injury to Mrs. Morris, and if and when you have exhausted your $5,000 limits for claims arising out of the injury to Mrs. Morris, then our exclusion would not apply, and we would be willing to defend Mr. Suter on that cause of action.

We are not advised as to whether you have made any payment on the Beulah Morris judgment, and until we know that we can take no position with respect to the cause of action for loss of consortium. As to the first and second causes of action, we respectively decline your tender of the defense. When you have exhausted your policy with respect to the injuries of Mrs. Morris, then we will be

pleased to cooperate with you in defending Mr. Suter, but only as concerns the cause of action for loss of consortium.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By RANDALL B. KESTER.

cc—Phillips, Hodler & Sandeberg, Public Service Bldg., City.
cc—Oregon Auto, City
cc—Cunning & Brewster, Redmond, Ore.

The Court: Are you offering 20?

Mr. Phillips: Yes, your Honor. That is on the Salem deal. [19]

Mr. Kester: May I ask for what purpose this letter is being offered?

Mr. Phillips: There will probably be some evidence on that, Randall. Maybe we can agree that you called me up and told me that Mr. Brewster wanted us to appear down there. Do you remember that?

Mr. Kester: I wouldn't agree with that summary of our conversation. However——

Mr. Phillips: What was the conversation?

Mr. Kester: We will put on the evidence, if necessary. We will object to that letter from Mr. Brewster to Mr. Phillips on the ground and for the reason it is purely hearsay, not binding on the Defendant Oregon Automobile Insurance Company

at all; that any statements purported to be made by Mr. Brewster are not in any way binding on the Oregon Automobile Insurance Company. I think that is sufficient.

The Court: All right. I will note your objection.

(Letter dated September 11, 1950, George H. Brewster to Wendell K. Phillips, was marked Plaintiff's Exhibit 20.)

PLAINTIFF'S EXHIBIT No. 20

Cunning & Brewster
Attorneys at Law
Redmond, Oregon

September 11, 1950

Mr. Wendell K. Phillips
1208 Public Service Building
Portland 4, Oregon

Re: Morris v. Suter

Dear Sir:

I just received your letter of September 8. I have been advised unofficially by Oregon Automobile Insurance Company that they are going to take over the defense of the above action. I have requested that they give you an immediate answer. If I am to try to get the case changed over here for trial, I want to be in on all of the preliminaries in getting it put over here. I believe we can have the place of trial fixed for Deschutes County.

I will write a letter to the Oregon Automobile

Insurance Company and enclose a copy of it in this letter.

Very truly yours,

/s/ GEO. H. BREWSTER.

GHB:r

enc

Mr. Phillips: A letter from Cunning & Brewster to Oregon Automobile Insurance Company, November 28, 1950. I apparently missed that one.

The Court: Is that No. 23?

Mr. Phillips: This is concerning the attorney's fees, your [20] Honor. I don't think that is material under the pre-trial order.

The Court: How about the letter from Brewster to you dated September 14th? Are you offering that one, Exhibit 21?

Mr. Phillips: No, your Honor.

The Court: All right. What about Exhibit 22?

Mr. Phillips: No, that is on the estoppel.

The Court: What about 23?

Mr. Phillips: That is on the estoppel.

Mr. Kester: We have 23 here, your Honor. We will offer that one.

The Court: Any objection, Mr. Phillips?

Mr. Phillips: No.

(Copy of letter dated July 8, 1950, George H. Brewster to United States Fidelity & Guaranty Company, was marked Defendants' Exhibit 23.)

DEFENDANTS' EXHIBIT No. 23

Law Offices of
Cunning & Brewster
Redmond, Oregon

July 8, 1950

United States Fidelity & Guaranty Company
Cascade Building
Portland, Oregon

Gentlemen:

I have received a copy of a letter you have written to Mr. and Mrs. Suter in regard to Ray Suter's automobile policy 54-AL-2640. In regard to the contents of your letter, I am unable to advise you what attitude the Oregon Automobile Insurance Company will take. I am defending the action, representing Ray Suter and also the Oregon Automobile Insurance Company. As far as Houk Motor Company is concerned I am certain they will get an order of involuntary non-suit against plaintiff.

As far as taking over the defense is concerned, I understand Oregon Automobile Insurance Company will take over the defense as far as Houk Motor Company is concerned, but I was employed by the General Adjustment Bureau to defend Suter and also am employed by the Oregon Automobile Insurance Company to defend Houk. We have to put in separate defenses due to the nature of the case.

In any event, I do not anticipate too much trouble in the defense of this case.

Very truly yours,

/s/ GEO. H. BREWSTER.

GHB:jf

cc—Mr. Ray Suter
Redmond, Oregon
—Oregon Automobile Insurance Company
Equitable Building
Portland, Oregon

Mr. Kester: I might say that is offered largely in rebuttal of any inference that may be drawn from other letters of Mr. Brewster.

Mr. Phillips: Your Honor, I might just as well put in these others. I would like to ask for an amendment of the pre-trial order adding 24 and 25, if those letters are going in. One of them is a letter from myself to George Brewster, and the other one is a letter from Maguire, Shields & Morrison to George [21] Brewster.

Mr. Kester: As far as the letter dated December 4th, 1950, from Phillips to Brewster is concerned, we would object to it as being purely self-serving. It is not in any way binding on us. It merely relates to the manner in which the U. S. F. & G. is going to pay its own attorney, and it is in no way binding on this defendant. It is purely hearsay as far as we are concerned.

Now, the letter which I wrote to Brewster, dated

December 5th, is largely concerned with the same matter, and I don't really think that it is material to this case. However, if those are going in—they have not previously been referred to, and therefore there was nothing in the pre-trial order about them—I would ask Counsel if he would agree that the United States Fidelity and Guaranty Company did, in fact, pay Brewster attorney's fees for representing Suter in all of these actions.

Mr. Phillips: You don't have to ask me that, your Honor. That is in the pre-trial order.

The Court: It is admitted, isn't it?

Mr. Kester: If it is covered, all right. Otherwise it would be by Counsel's present statement.

The Court: That is part of the amount that plaintiff is trying to recover from Oregon Auto?

Mr. Phillips: That is correct, and that is in the pre-trial order.

(Copy of letter dated December 5, 1950, Randall [22] B. Kester to Cunning & Brewster, was marked Plaintiff's Exhibit 24; copy of letter dated December 4, 1950, W. K. Phillips to Cunning & Brewster, was marked Plaintiff's Exhibit 25.)

PLAINTIFF'S EXHIBIT No. 24

Maguire, Shields, Morrison & Bailey
Attorneys at Law
723 Pittock Block
Portland 5, Oregon

December 5, 1950

Cunning & Brewster
Attorneys at Law
Redmond, Oregon

Re: Morris v. Suter et al

Attention: Mr. Brewster

Dear Sir:

The Oregon Automobile Insurance Company has referred to us for answer your letter of November 28, 1950 with respect to the fees and expenses in connection with the above case. As you know, it is the position of the Oregon Automobile Insurance Company that you were retained by it to represent the defendant Houk Motor Company, and that the Oregon Auto was not obliged to and did not defend Suter, but that your defense of Suter was on behalf of the United States Fidelity & Guaranty Company.

It would be our suggestion that all fees and expenses up to the time of trial, including the taking of depositions, obtaining medical examinations, and preparation for trial be divided equally as between the defense of Houk Motor Company and the defense of Suter. The Oregon Automobile Insurance Co. will pay that one-half representing the defense

of Houk Motor Company. It is our belief that the other one-half, representing the pre-trial expenses for the defense of Suter, should be paid by the U. S. F. & G., and that all of the trial expenses, including the fee of Bruce Spaulding, should be paid by U. S. F. & G. We understand that the Oregon Auto has already paid certain expenses for medical examinations for which it would be entitled to credit against its share of the expense.

In connection with the cost bill, to which we understand you have filed objections, a copy of a purported subpoena was delivered to Oregon Automobile Insurance Company, together with the sum of $28.00 witness fees. The subpoena was void for the reason that it required attendance at a place farther than 100 miles, and was not accompanied with any order of the Court. The witness fees were not used, and have been returned to Mr. Samuels.

Very truly yours,

MAGUIRE, SHIELDS,
MORRISON & BAILEY,

By RANDALL B. KESTER.

RBK/mm

cc—Oregon Automobile Ins. Co., City
cc—United States Guaranty & Fidelity Co.—City
cc—Philips, Hodler & Sandberg, Attorneys at Law
—City

PLAINTIFF'S EXHIBIT No. 25

December 4, 1950

Cunning & Brewster,
Attorneys at Law,
Redmond, Oregon.

Attention: Mr. George H. Brewster.
Re: Morris vs. Suter.

Dear Sir:

This is to advise that I am in receipt of a copy of your letter of November 28, 1950.

I am requesting U. S. Fidelity & Guaranty Company, the company I represent, to either pay one-half of your charges or pay whatever you arbitrarily determine they owe. As far as the U. S. Fidelity & Guaranty is concerned we attempted to settle this case and would have done so if the Oregon Automobile Insurance Company would have paid one half of the said settlement. The Oregon Automobile Insurance Company refused to cooperate and arbitrarily advised us that they would not pay any greater sum than $1,500.00. As I understand it now, the plaintiff has no interest in our $5,000.00 policy, but expects to collect his judgment from the Oregon Automobile Insurance Company. If the Oregon Automobile Insurance Company sees fit to bring us in, then, of course we expect to collect from them any and all amounts that we have paid out up to the present time.

Kindly let me know what amount you expect from us and I assure you that it will be paid.

Copy of this letter goes to Mr. Kester, who has been representing the Oregon Automobile Insurance Company in this matter.

Very truly yours,

PHILLIPS, HODLER & SANDEBERG,

By .....

WKP/dp

cc: Randall B. Kester.
cc: U. S. Fidelity & Guaranty.

The Court: Does that complete your case?

Mr. Phillips: Yes, so far as that particular phase of it is concerned.

The Court: In so far as attorney's fees are concerned?

Mr. Phillips: And those incidental expenses.

The Court: All right.

Mr. Kester: While we are offering exhibits—I don't know if this is the proper time for it, but I would like to have marked and offered the Oregon Automobile Insurance Company Daily for its policy, which under this numbering would be 26, I believe. We have put the policy in, and I would like to have the Daily.

Mr. Phillips: I didn't put my Daily in.

Mr. Kester: It is referred to here. I would like to have the Daily go in, anyway.

The Court: Any objection to the Daily?

Mr. Phillips: No objection, your Honor.

The Court: It may be admitted.

(The document referred to, entitled "Automobile Daily Report, Oregon Automobile Insurance Company," was received in evidence and [23] marked Defendants' Exhibit 26.)

The Court: Mr. Kester, do you want to put in anything as to plaintiff's right to recover attorney's fees from Oregon Auto? That is, attorney's fees expended in connection with the defense of the cases?

Mr. Kester: I don't think it needs any evidence, your Honor. I think it is largely a question of law. As far as the expenses of defending the cases are concerned, it will be our position, first, that regardless of whether Oregon Auto might be liable under its policy the U. S. F. & G. was concurrently liable, at least for the defense of its own named assured, and that therefore it was obligated to carry on the defense regardless of where the ultimate liability might fall. We would also suggest to the Court from the exhibits that are already in, which the Court has not had a chance yet to consider, it will appear that there was not any demand made on the Oregon Auto at all until after the U. S. F. & G. had already undertaken the defense of those cases.

The Court: All right. I will look and see if there was a proper tender. I have some doubt, Mr. Phillips, as to whether you are entitled to recover, regardless of whether there was a proper tender.

I think you will agree that if the defenses were not tendered to Oregon Auto plaintiff would not be entitled to recover.

Mr. Phillips: I don't think that is true; not in an equity [24] court. They are not required to make any tender at all under the circumstances, where they were defending one defendant, and they knew all about it. In a court of equity those could be expenditures made for their use and benefit.

The Court: All right.

Mr. Phillips: We could turn around and sue them for money had and received on the same proposition.

The Court: Now we will go to the next point. Are you entitled to attorney's fees as against the Oregon Auto for services rendered in connection with this case?

Mr. Phillips: I think so.

The Court: Give me some citations. Have you got any cases?

Mr. Phillips: Under the statute, your Honor. The Oregon statute is right square on it.

The Court: What does it say?

Mr. Phillips: Section 101-134:

> "Whenever any suit or action is brought in any court of this State upon any policy of insurance or any kind or nature whatsoever, including the policy or certificate issued by fraternal benefit societies as defined in Section 101-701, the plaintiff, in addition to the amount

which he may recover, shall also be allowed and shall recover, as part of said judgment, such sum as the Court or jury may adjudge to be reasonable as attorney's fees in the said suit or action; [25] provided that settlement is not made within six months from the date proof of loss is filed with the company or society; provided, further, that if a tender be made by a defendant in any suit or action and the plaintiff's recovery shall not exceed the amount thereof, then no sum shall be recoverable as attorney fees. If attorney fees are allowed as herein provided and on appeal to the Supreme Court by the defendant the judgment is affirmed, the Supreme Court shall allow to the respondent such additional sum as the Court shall adjudge reasonable as attorney fees of the respondent on such appeal. The terms of this act shall not apply to any suit or action started or begun prior to the passage of this act."

It says any lawsuit under any kind of an insurance policy in any court.

The Court: You mean for the purpose of getting the defendant to assume liability in a case they would be liable for attorney's fees to the U. S. F. & G.?

Mr. Phillips: I think so, your Honor.

The Court: I think that is referring to Mr. Samuels' client.

Mr. Phillips: Here is the situation, your Honor. We are in an equity case. The Federal Court in equity has jurisdiction to allow attorney's fees. In this particular case it was necessary for us to bring this lawsuit to determine who was liable. It was necessary to do that to make that determination. We [26] brought this matter into court, this $7300 judgment, and also the fact that they are required to defend this other case for $9200. That was necessary and for the benefit of everybody. There is no question, I don't believe, in anybody's mind but what an insurance company acts as an agent for their assured. We had to do that. We had to protect him. Also, we had to have the liability determined in equity. Now this is an action on an insurance policy. The recovery has been allowed.

The Court: Do you think that Mr. Samuels is entitled to an attorney's fee?

Mr. Phillips: I most certainly do.

The Court: Do you think that you are also entitled to an attorney's fee?

Mr. Phillips: I do.

The Court: Have you any cases on it?

Mr. Phillips: I have a United States Supreme Court case on general authority. Is there any question in your mind but what you have authority to grant attorney's fees in cases of this kind, in equity cases?

The Court: I think the fact that the case was brought in equity alone does not make any difference, but are you the type of person that the law

attempts to cover? That is what I am talking about.

Mr. Phillips: The general equity jurisdiction of the Federal Court, your Honor, as I understand it, permits your Honor to [27] grant an attorney's fee.

The Court: Even in the absence of statute?

Mr. Phillips: In the absence of any statute, your Honor. That is an authority that you have.

The Court: You make two contentions: First, that under the statute you are entitled to it and, secondly, that even in the absence of statute——

Mr. Phillips: Even in the absence of any statute your Honor has authority to grant an attorney's fee. This case is Lloyd F. Sprague, Petitioner, vs. Ticonic National Bank, and others, 307 U. S. 160, 83 Law Ed. 1184. That lays down the principle, I believe, that the Federal Court, a court of equity, has broad enough and sufficient jurisdiction in an equity case to allow an attorney's fee.

The Court: Even in the absence of statute?

Mr. Phillips: In the absence of any statute. You don't need any statute at all.

The Court: Let's hear what Mr. Kester has to say.

Mr. Kester: If the Court please, in the first place, talking about the statute, I think the statute by its terms does not cover the U. S. F. & G. in this case. In the first place, it says whenever any suit or action is brought in any court of this State.

The Court: I think, Mr. Kester, that that has

been construed to permit the recovery of attorney's fees in this court. [28]

Mr. Kester: Very well; the Court may by comity follow the statute, but the statute by its own terms does not expressly permit it because it is just talking about State Courts, although the Court might choose to follow the statute here.

However, going further, it says, "upon any policy of insurance." Now this was not an action brought on a policy of insurance. This was an action for a declaratory judgment to have the Court interpret two policies of insurance, both theirs and ours. Now, when they talk about an action on a policy of insurance, the statute is obviously talking about someone seeking to recover in his own behalf money required to be paid under the policy.

The Court: Mr. Kester, isn't that satisfied by the affirmative complaints of Mr. Samuels' clients?

Mr. Kester: As far as Mr. Samuels is concerned he is in a much different position than Mr. Phillips on this point. Now I don't seriously deny that Mr. Samuels would be entitled to attorney's fees, although there are some factors of that I would like to discuss in a moment. But certainly if the Morrises can be considered as having counter-claimed on the policy and therefore brought an action on the policy, the U. S. F. & G. did not sue on the policy because they don't stand in the position of the Morrises on this situation. In fact, their contention is expressly that they do not stand in the position of the Morrises. [29]

The Court: I know that. They are an adverse party, too.

Mr. Kester: Certainly. They are asking for an interpretation of the contract, just like any other contract. Now, as far as this being in equity is concerned, of course declaratory judgments are sui generis. They are under particular statutes. Declaratory judgments are not any more equitable than they are legal. They are a kind of proceeding all their own. And the Court in a declaratory judgment suit, I think, is limited to relief of a declaratory nature, and such relief as may be ancillary to the declaration of rights. But it does not gain anything to come in here and say we are in equity, because we are not. We are under a particular statute. It is a statutory type of procedure.

The Court: Do you think there is any prohibition against my allowing the plaintiff restitution for the amounts that he has expended for the defense of this action?

Mr. Kester: Any prohibition?

The Court: Yes. Do you think I am prevented by lack of power to require the Oregon Auto to pay the amounts expended by the U. S. F. & G. in the defense of the case in Salem?

Mr. Kester: As far as the question of power is concerned, of course, I guess the Court can order us to do anything that is within the scope of the issues. However, I think as a matter of construction of the policies we should not be required to pay them, because under their own policy they

are [30] obligated to defend their assured, regardless of who may ultimately have the liability.

The Court: I have indicated that I am fairly sympathetic with your point of view, but I don't know whether I am right. This question may arise even though I hold against the Defendant Oregon Auto—even though I hold with Defendant Oregon Auto on the question of restitution then we have the question of whether the U. S. F. & G. is entitled to recover by reason of this action brought. Do you have any cases which indicate in a proceeding of this kind the plaintiff company is not entitled to attorney's fees?

Mr. Kester: In this particular proceedings? That is, for bringing this proceeding?

The Court: Yes.

Mr. Kester: I have no cases, your Honor. I would rely on the general principle that, generally speaking, attorney's fees cannot be allowed in the absence of some statute authorizing it. But there is no statute suggested here to authorize it. Counsel says that they did it for our benefit, and that they could sue us for money had and received —no, I am confused with the other one. Counsel suggested that it was necessary for them to bring this declaratory judgment action. That I deny. Now, it may have been convenient for him, convenient for all of us, perhaps, to have this determined in the declaratory judgment action rather than in a garnishment proceeding on [31] the policy. The Morrises could have garnished the U. S. F. & G. policy and could have garnished our

policy, and these questions could have been threshed out there. Or he could have sued either one or both directly. But it was not necessary in the sense of the U. S. F. & G. preserving its rights to bring this particular action. That was merely a convenience for them.

Mr. Beebe reminds me—and I think it is a good point, your Honor—supposing that Mr. Suter had pursued the remedies I have just suggested. Suppose that he had garnished the policy of the U. S. F. & G., and the U. S. F. & G. had been required in that proceeding to pay Suter, and the U. S. F. & G. then had turned around and sued us and raised the same issue that they have attempted to raise in this proceeding. That proceeding would only then have been for money had and received, for money paid for the use and benefit, for our use and benefit by satisfying the judgment. Suppose they had gone ahead and done that. That still would not have been an action on the policy. That would have been a common law action of assumpsit. Of course, that goes both to the original defense, in a way, and also this proceeding.

The Court: The liability of Oregon Auto would certainly have been predicated on the policy. I don't see how they could have sued——

Mr. Kester: It would not be a liability to the U. S. F. & G. It would have been a liability to Suter, perhaps, if any at all, [32] but not to the U. S. F. & G. The U. S. F. & G. is not under any circumstances either a named assured or an additional assured under our policy. We owe no duty

whatsoever to the U. S. F. & G., except as it might arise if they had paid something for our benefit. Then there might be an equitable suit for a contribution or for indemnity or for money had and received, but they would not be suing on the policy. They would be suing under their common law or equitable right of reimbursement.

The Court: If they were suing on a right of subrogation——

Mr. Kester: Of course, they are not subrogated in this type of situation. Even so, that would not have been on the policy, because they are not either a named assured or an additional assured. If they paid something they were not required to pay, and did it to our benefit, they might have an equitable proceeding in subrogation or indemnity, or a contribution, or an action for money had and received, but it still would not be an action on the policy within the meaning of this.

The Court: All right. Mr. Phillips, what have you got to say?

Mr. Phillips: If the Court please, I don't understand Counsel's theory that a declaratory judgment action is not in the nature of an equitable suit. Now, your Honor asked for authorities. I might suggest to your Honor that there is a case in this court where Judge Mathes in Los Angeles in a [33] declaratory judgment suit allowed a $25,000 attorney fee that I was on the wrong end of, I remember that distinctly, in a declaratory judgment suit. And so far as bringing the action is concerned, Counsel says, "Why, sure, he could have

garnished us both." He could have brought probably a half dozen different kinds of lawsuits against both of us, and we could, too. That is just the reason for bringing this one suit by this plaintiff, to block and stop all of that litigation and have it all determined, all the contentions, in one suit. That is for the benefit of them as much as anybody else. We certainly are a third-party beneficiary under that contract, and we have been benefited. We brought this fund of theirs into this court, and we are entitled to recover.

Now I was surprised at Counsel. When the Oregon sued the General Casualty Company of America for a contribution, the Oregon Automobile Insurance Company, through Mr. Kester, had this to say concerning that statute:

> "With respect to attorney's fees, while this is not a suit on an insurance policy in the ordinary sense, it is a suit based on the policy in the sense that the plaintiff's right of contribution depended upon the obligation of defendant to the insured. That obligation is evidenced by the defendant's policy. The statute, Section 101-134, O.C.L.A., says, 'any suit or action,' and it is not limited to a suit by a beneficiary or the [34] named assured. The amount of such fees we leave to the discretion of the Court. Respectfully submitted, Randall B. Kester."

Now that is the best authority I have.

The Court: What did the Court do?

Mr. Phillips: He hasn't done it yet.

Mr. Kester: No less an authority than Mr. Oppenheimer said I was wrong when I said that.

Mr. Phillips: I don't think there is any question about that interpretation of the statute. We are not only relying on that statute, but we are entitled, as I see it, to recover a reasonable attorney's fee for the bringing of this suit for the benefit of all parties under the equity jurisdiction of this Court.

The Court: How much do you think Mr. Samuels is entitled to?

Mr. Phillips: How much do I think he is entitled to? I am not going to set his fee. That is your province; not mine.

The Court: Do you think you should contribute or participate in the fee of Mr. Samuels?

Mr. Phillips: No, your Honor, I don't. Probably the fact that I do not contribute to Mr. Samuels would warp my views to some extent on what he is worth.

The Court: We ought to hear from Mr. Samuels. How much work have you done? [35]

Mr. Samuels: I think, your Honor, the file itself shows——

The Court: Do you want him to take the stand?

Mr. eKster: I don't insist on it, your Honor.

Mr. Phillips: Not me.

The Court: All right.

Mr. Samuels: I have a little formula which I have worked out, which may or may not be approved by the Court. It seems to me that $1100 would be a reasonable fee in this matter.

The Court: $1100? How do you arrive at that?

Mr. Samuels: I arrived at that for this reason: That this matter, as most personal injury cases I have handled, was handled upon a contingent basis.

The Court: I am not going to allow a fee on that basis.

Mr. Samuels: I wanted to give you the reason for it, your Honor. As far as I am concerned, this is the same as an appeal. I wrote to my lady when this matter first came up and told her I would have to charge the same as on an appeal, which is the difference between 40 per cent and 50 per cent. I don't know why she should have to pay the difference on it. That would come, roughly, to $750. We have two cases here, and I think that the work I have done here would justify that, together with about three hundred or three hundred fifty dollars for defending Mr. Morris' interests. He has a case with nine thousand dollars plus involved, and he is also sued here, and this applies to his case which is pending. I am referring to the value of [36] the services as well as the actual physical work done.

The Court: That is what I would like to have you tell us. Do you keep a time record?

Mr. Samuels: No, I don't. I know what I did, however.

The Court: What was it?

Mr. Samuels: When this matter first came in I had issued an execution against Mr. Suter. When the papers came into the office I immediately had

them copied, which was quite a task. I prepared and mailed to Mr. and Mrs. Morris authority for me to appear and represent them. We subsequently had a telephone conversation where it was agreed I would go right ahead and make an appearance for them without having them served by the Marshal.

The mechanics, then, were to prepare the pleadings. I worked with Mr. Phillips in this case, had at least four or five physical contacts at his office—we had coffee together at one time—and I went through my file and furnished him with the documents I had on this estoppel matter. I think he prepared a pre-trial order, or a proposed order, which I went over together with him, and we made some amendments to that one. It was necessary to check the entire law on this, for the reason that it was not until I think the answer of the Oregon Auto was filed, a matter of a very few days before the pre-trial conference and the trial, because at that time I was under the assumption they would deny any coverage as they had [37] before, except for the $5,000, and I felt it my duty to go into the applicable law here which was cited during the course of the trial, and which I had checked to determine the rights of our people here.

The Court: You made an independent investigation of the law?

Mr. Samuels: That is right, your Honor.

The Court: Let me see your trial memorandum.

Mr. Samuels: I have no trial memorandum

except the notations of cases. When I say I did it, the man from our office did it. I am referring to Mr. Crookham, who was paid by us to do that. They are probably in here. Here is one here.

The Court: If Mr. Crookham did the work, let him testify as to what work he did.

Mr. Samuels: May I call Mr. Crookham?

The Court: Yes.

CHARLES S. CROOKHAM

was thereupon produced as a witness in behalf of Defendants Morris and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Samuels:

Q. By whom are you employed, Mr. Crookham?

A. I am employed by yourself and Mr. Vergeer, Vergeer & Samuels. [38]

Q. What does your work consist of?

A. Primarily legal research for the office.

Q. Did you at my request and before the time that this case came on for trial go to the Law Library and prepare a rather exhaustive research of cases pertaining to the various subject matters which have come up? A. I did.

Q. May I ask you as to whether when you found cases that you thought were negative as to the issues if you prepared briefs on those cases?

A. No, I didn't. I merely discarded them from my own notes.

(Testimony of Charles S. Crookham.)

Q. About how much time do you think you expended in legal research before the trial?

A. Before the trial in Bend?

Q. Before the trial here before the Court, on this matter that is before the Court at this time. I think you were present at the time of the trial, were you not?

A. Yes. I roughly estimate—I didn't keep a timecard myself—I spent about two or two and a half full working days.

Q. That was doing nothing except research work? A. Yes.

Q. Did you prepare, as the Court has requested me to furnish him, any detailed trial brief of the law? A. No, I didn't in this case.

Q. What is our usual practice in the office as to that where [39] we are representing the plaintiff in the case?

A. Usually we attempt to keep it down to a minimum. When something very detailed is required I dictate it to the girls, the actual authorities that we want to use, separating the good from the bad, and just reducing it to a fair minimum.

Q. Were you present in the courtroom of Judge Solomon at the time this matter was heard?

A. Yes, I was.

Q. The cases that were cited in the trial of this case by both the plaintiff and the Defendant Oregon Automobile and the other defendants represented by Mr. Kester, had you perused and found almost all of those cases that were cited?

(Testimony of Charles S. Crookham.)

A. I would not say almost all. Mostly the line of cases I seemed to be following were Mr. Phillips' cases, and I was not, frankly, very familiar with many of the cases Mr. Kester cited.

Q. You had found all of those cited by Mr. Phillips, had you? A. Approximately, yes.

Q. Had those been read by you and studied?

A. Yes.

Q. And before the answer was filed by Mr. Kester had we gone into the matter as to whether Oregon Automobile Insurance Company would be required to pay in the event that the U. S. F. & G. was found to be the only applicable insurance in this case? A. Yes.

Q. Will you tell us which of these memoranda were prepared by [40] you, if any of them?

A. All of these were, these four or five cases that you have here with just very cursory briefs, were ones that I made. You made some notes this afternoon from what I read you out of an Oregon case on the measure of damages or the measure of recovery. The rest of these notes were made in my own handwriting.

Q. As I recall, Mr. Crookham, there was another sheet of notes some place. I can't find them now. Am I correct in that?

A. Yes. These don't represent the entire notes.

Mr. Samuels: No further questions.

(Testimony of Charles S. Crookham.)

Cross-Examination

By Mr. Kester:

Q. Are you admitted to practice law, Mr. Crookham? A. I am not, Mr. Kester.

Q. You are now attending the Northwestern College of Law? A. Yes, sir.

Q. As a matter of fact, you studied the law of insurance under me last semester, didn't you?

A. Yes, sir.

Q. You didn't find the cases that I cited to the Court here?

A. No, I didn't, Mr. Kester.

Q. That won't be held against you as far as your grades are concerned. Do you have any idea about how much time you spent on this?

A. I think from my own work it was about two and a half working [41] days.

The Court: What do you call working days, how many hours?

A. Oh, your Honor, I think I would average probably six and a half actual hours of study or research on a problem.

The Court: In a day? A. Yes, sir.

Q. (By Mr. Kester): How long have you been employed by Mr. Samuels?

A. Since September of 1949.

Q. Have you been working full time in his office?

A. Yes, I have, with the exception of a tour of duty with the Army.

(Testimony of Charles S. Crookham.)

Q. How long since you came back?

A. I have been with him since September, with the exception of two months in the intervening period of time.

Q. Do you do investigation work as well as legal research? A. Yes, a certain amount.

Q. Do you know about how much of your time is spent on legal research?

A. About 95 per cent.

Mr. Kester: I have no further questions.

Mr. Phillips: No questions.

Redirect Examination

By Mr. Samuels:

Q. May I ask one question: Are you about ready to take the Bar? [42] A. Yes.

Q. That will be this coming time?

A. I trust I will be able to then.

Mr. Samuels: Thank you. No further questions.

(Witness excused.)

Mr. Samuels: Does the Court wish anything further on this? I might point out that the time here would be a matter of two and a half days that Mr. Crookham worked on it, and a day in attendance here. I am talking about the time of the trial. There were either one or two appearances on call. I am not sure whether we had one or two. And there was the necessary office work. There was probably a total of six and a half actual working days on this.

The Court: Including Mr. Crookham's time?

Mr. Samuels: Yes, sir.

The Court: I will think that over.

Mr. Samuels: It would be more than that, probably; probably another day besides that, including the time we spent with Mr. Phillips' office.

The Court: Mr. Phillips, are you sending Mr. Samuels a bill, too?

Mr. Phillips: No, your Honor.

Mr. Kester: Does your Honor wish to hear from me on this?

The Court: Yes. [43]

Mr. Kester: As I indicated to the Court, we do not seriously oppose the allowance of some attorney's fee to Mr. Samuels, but under the peculiar circumstances of this case, while I would not ordinarily take issue with the reasonableness of an attorney's fee which is seriously claimed, I think I should make some observations on this particular kind of a case.

In the first place, it has been rather obvious, I think, that Mr. Samuels in this case has been more or less working hand in hand with Mr. Phillips. I don't say that in any spirit of criticism, because of course he is entitled to, but I think that should be taken into consideration in evaluating his position in the case. It seems to me that it is entirely conceivable that the Morrises were not necessary parties to this proceeding except in a purely formal manner. No one, so far as I know, has ever seriously questioned but what the Morrises were entitled to have their judgment paid by one or the

other of the insurance companies, and it is just a question purely between the companies. The only purpose, so far as I know, of having the Morrises in the case is just so that whatever judgment is entered is binding on them and that they are not in an adverse position at all. However, they really had nothing to lose whatsoever by this case. So that the appearances here have not been in any sense necessary.

Of course, the plaintiff, for the plaintiff's own convenience, made them parties so that the judgment would be [44] binding on them. We didn't make them parties. It is not through any of our doing that they were named as defendants here or that Mr. Samuels felt he should appear for them. I think that if the case had gone by default as against the Morrises it would not have made the slightest difference in the case of the Morrises because they would be sure to be paid by one or the other of the companies in some proportion.

We have always taken the position that when the U. S. F. & G. had satisfied their obligation, what we conceived was their primary obligation, we would pay the balance, if any. That was expressed in our correspondence and it was expressed in the answer that was filed here.

The statute which I imagine they rely on, the Oregon statute, provides that in the event of a tender and they don't recover more than the tender there shall be no fees at all. In this case the judgment that the Court has indicated so far would imply a judgment against the Oregon Auto for

more than the tender, but I think it can be taken into consideration in evaluating the necessity for these services that we have at all times been willing to pay the difference if the U. S. F. & G. paid its five thousand. No one has ever denied that they were entitled to be paid by one company or the other.

I don't think that it is a case where they should be regarded in the same light as in another type of case.

Mr. Phillips: Just a moment. If the Court please, I don't [45] agree with Mr. Kester's statement at all. As a matter of fact, he denied liability, so far as I know, entirely on his policy and said it didn't cover. And I think that his correspondence and these exhibits show that position, and that that was his position up to the time we were going into pre-trial here, until he wrote me that second letter. His position was up to that time that they didn't owe anything.

Mr. Samuels: May I say the same thing occurred between Mr. Kester and myself. He denied any coverage at all, and it was necessary for us to be in here for that reason, and to help prepare the law for that reason.

The Court: When did he deny coverage?

Mr. Samuels: It seems to me it was before the case was filed.

Mr. Kester: The correspondence, I think, is perfectly clear.

Mr. Phillips: You didn't write to Mr. Samuels?

Mr. Kester: No.

Mr. Samuels: I might advise the Court that I

called Mr. Kester about getting out an execution, and he told me there was no coverage as far as his company was concerned.

Mr. Kester: If this is going to depend on our respective testimony as to what that conversation was——

The Court: I will rule on that in the next couple of days.

Mr. Kester: If other matters have been completed, may I make an offer of proof, your [46] Honor?

The Court: Yes.

JOHN C. DORAN

was thereupon produced as a witness in behalf of Defendant Oregon Automobile Insurance Company and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Doran, are you employed by Oregon Automobile Insurance Company?

A. Yes, I am.

Q. What are your duties?

A. Well, my duties are as comptroller, including automobile underwriting.

Q. Would you speak up just a little louder.

A. They include automobile underwriting, too.

Q. What is your title with the company?

A. Comptroller.

(Testimony of John C. Doran.)

Q. How long have you been with the Oregon Automobile Insurance Company?

A. Fourteen months.

Q. How long have you been in the insurance business or connected with it?

A. Twenty-three years. [47]

Q. During that twenty-three years what has generally been the nature of your experience? What line of the insurance industry were you in?

A. General insurance.

The Court: Are you an underwriter? Did you work for underwriters? You were in the underwriting end, weren't you?

A. I have been, yes, and am at present.

The Court: Is there any doubt of his qualifications?

Mr. Phillips: I don't know what he is going to qualify on.

The Court: On how they determine rates.

Mr. Phillips: I don't care about that.

Q. (By Mr. Kester): Are you familiar with the manner in which automobile liability insurance rates are computed? A. Yes.

Q. Is that a part of your duty at the present time? A. That is correct.

Q. Have you been familiar with the computation of liability rates over a period of years?

A. That is correct.

Q. Will you tell us how classifications for liability rates are established? Who establishes them and how are they established?

(Testimony of John C. Doran.)

A. They are established by statistical bureaus from the accumulation of experience figures from various companies, insurance companies. [48]

Q. Is there a central organization that puts out manuals of that sort? A. Yes, there is.

Q. What is that organization?

A. The National Bureau of Casualty Underwriters.

Q. Does that Bureau have a manual of rate classification? A. It has.

Q. Is that for all types of liability insurance?

A. Yes, they have.

Q. Does that cover automobile liability insurance? A. Including automobile liability.

Q. Now, does the Oregon Automobile Insurance Company follow generally the classifications set up in the National Bureau Manual?

A. Generally, yes.

Q. As of the present time, as these are handled at the present time, what factors, generally speaking, enter into the computation of an automobile liability rate? A. The premium?

Q. Yes.

A. The territory or location, the individual, his age, occupation, perhaps, or the use made of the automobile.

Q. Is there account taken of the particular kind of automobile he is driving?

A. No, that has no bearing. [49]

Q. Has there been any time in the underwriting business when the kind of automobile was an im-

(Testimony of John C. Doran.)

portant factor in the computation of a liability premium? A. Years ago, yes.

Q. Up until about what time was that true?

A. About March of 1940 there was a complete change.

Q. Prior to March of 1940 did the Manual of the National Bureau include classification based on the kind of automobile driven?

Mr. Phillips: If the Court please, I think the Manual would be the best evidence instead of what this man says it is. He is going quite far, I think.

Mr. Kester: I think, your Honor, that the testimony is competent as summarizing the results of a very complex and voluminous bunch of documents.

The Court: Objection overruled.

Mr. Phillips: I object to it as calling for a conclusion.

Q. (By Mr. Kester): Based on your knowledge of the method of computing liability rates prior to 1940 would you state whether the kind of car had something to do with it then?

A. It did at that time.

Q. In what way?

A. Each make of automobile was assigned a symbol, a letter symbol. They were grouped. As I recall, there were three groups. I don't recall the details.

Q. Generally speaking, what type of automobiles carried higher [50] rates?

A. Well, the larger, more expensive ones, generally.

(Testimony of John C. Doran.)

Q. Now, since 1940 has that factor been important in writing liability insurance at all?

A. Of no importance.

Q. Are there any other factors in the computation of an automobile liability premium other than the risk of the particular driver, or are they all related to the particular driver?

A. Well, the other drivers of the vehicle might enter into it.

Q. For example, in the particular case here I will ask you to refer to Exhibit 26, which is the Daily for this particular policy. I will ask you to state how the premium for this policy was computed.

A. This premium was computed on the basis of payroll.

Q. This is what is known as a garage liability policy? A. Correct.

Q. Would you explain how pay roll enters into the computation of the premium?

A. Well, you have three classifications of employes: Your clerical or office employes, which take one rate, and then your salesmen, managers, and so forth, who actually sell and demonstrate vehicles, who take another rate; and then there are the inactive partners or executives, and the mechanics, and so forth, who come into that third class.

Q. Now, the basic garage liability features of the policy do [51] not cover anyone other than employes of the garage itself, do they?

(Testimony of John C. Doran.)

A. I don't know that I quite understand your question.

Q. The basic garage liability endorsement only covers the garage itself and its employes; it doesn't cover additional interests, does it?

A. Not the basic policy, no.

Q. When an additional-interest clause is added, such as in this policy, covering people driving the garage's cars, how is the premium for the additional interest computed?

A. A percentage of the basic premium.

Q. And the basic premium is still on a payroll basis? A. That is correct.

Q. But in that type of policy is any consideration given to the kind of vehicle?

A. It does not enter into the premium at all.

Q. Is there even any consideration of the number of vehicles involved?

A. No, that has no bearing at all.

Mr. Kester: I think that is all.

The Court: The offer of proof is rejected.

Mr. Phillips: No questions.

(Witness excused.) [52]

The Court: Have you got another witness?

Mr. Kester: No, your Honor.

The Court: As I view it, the matters that are now submitted to me for determination are whether or not the United States Fidelity and Guaranty Company is entitled to reimbursement for money expended in defense of the two lawsuits, as to

whether or not the U. S. F. & G. is entitled to attorneys' fees for the bringing of this suit for a declaratory judgment, and the amount of attorney's fees to be allowed to the Defendants Morris, if any.

Mr. Samuels: If there is any question as to our being allowed an attorney's fee here, I would like to offer some more evidence.

The Court: I think that Mr. Kester has not seriously contended that.

Mr. Kester: I don't seriously question the right to them. I do suggest that the amount of them should be viewed with regard to their position in the lawsuit.

The Court: I know your position.

Mr. Samuels: Your Honor, if that is going to be taken into consideration I would like to offer some evidence on that.

The Court: What type of evidence do you want to offer?

Mr. Samuels: For one thing, as to whether we should be here or not. For another thing, I want to have the record show that I called Mr. Kester before this case was filed and he disclaimed any coverage in this policy as far as we were [53] concerned, which left us with $5,000 available from the U. S. F. & G. That is why we are in here, or one of the reasons we are in here.

The Court: Prior to the time of the pre-trial order you knew that the Oregon Auto was not seriously contending that you would not be entitled to that or that they were denying all liability.

Mr. Samuels: About two days before. I think

we were served on a Friday, if I am correct, or Thursday, and the trial was set for Monday.

The Court: From your examination of the law wasn't it quite simple for you to determine that either the U. S. F. & G. would be liable or the Oregon Automobile Insurance Company would be liable; that both of them could not get out?

Mr. Samuels: That was my interpretation of it, your Honor.

The Court: It seems to me, Mr. Samuels, that every case Mr. Phillips cited indicated that.

Mr. Samuels: That is right.

The Court: And it didn't take very much research to determine that point.

Mr. Samuels: That is correct.

The Court: Didn't you get your cases from Mr. Phillips?

Mr. Samuels: Some of them; not all of them.

The Court: I agree with the argument of Mr. Kester here, and you are not going to get very much attorney's fees in this case. [54]

Mr. Samuels: The question is whether we should be in here?

The Court: I will determine it in a few days.

Mr. Phillips: Do you want any evidence from me, your Honor, as to what I did?

The Court: How much work did you do?

Mr. Phillips: I did a lot of it.

The Court: I can see that.

Mr. Phillips: Not only that, I did it personally, too, because I was interested in this question very much. I did more than the amount, I presume, indi-

cated. I have a file here, and I can tell pretty close. I think I must have put in between 50 and 75 hours on this thing, looking up the law and writing proposed pre-trial orders.

The Court: I know that you spent a lot of time. I can see that.

Mr. Phillips: Too much.

The Court: The question involved is whether or not this is the type of proceeding which the law attempted to cover.

Mr. Phillips: In my humble opinion, your Honor, there isn't any question about that, for two reasons, both under the statute and under your equitable authority, because this thing had to be brought by someone. Otherwise we would have been litigating and litigating and litigating from now on. The only way to do it was for somebody to step in. The Oregon wouldn't do anything. They disclaimed any liability to me at first, and then finally [55] Mr. Kester got around and said for me to pay my five thousand first and then he would pay. Now, for instance, on September 12th here, his position was this:

> "Since the U. S. F. & G. policy, in which Suter is the named insured, is other valid and collectible insurance applicable to this claim, it appears that Suter is not covered by the Oregon Auto policy with respect to this claim, and that his defense is the responsibility of the U. S. F. & G. Company."

The Court: Is there anything in your claim which deals with the investigation of the claim?

Mr. Phillips: No, we didn't investigate it under the belief that they were on it. They told us all the time up until——

The Court: How did you defend the case without investigating it?

Mr. Phillips: We got a hold of Brewster and got on it right quick. That is the way we did. That is the only thing we could do.

The Court: You would not be entitled to recover for investigation?

Mr. Phillips: No, we are not asking any attorney's fee for investigation, your Honor. I am asking for the expenses of the investigation that they made when they finally found out that the Oregon was not going to cover. Then we had to jump in and see what we could do to investigate it. We didn't investigate [56] it or couldn't investigate it very long after the thing had broken and it was about to be tried. We were under the belief that the Oregon was on it. We didn't do anything. At the time that he filed this second suit, I think, down at Salem——

The Court: Did you pay for the principal defense of the case in Bend, Oregon?

Mr. Phillips: No. Brewster either called me or wrote me and said that he would divide it equally between Oregon and the U. S. F. & G. I wrote back to him and told him that would be fine with me. And then Mr. Kester wrote to him and told him no, he would not pay half; that he wanted it separated and segregated as to each one of us. So, based

on that—I don't know what bill he sent Mr. Kester, but he sent me a bill for four hundred and something. It is in the pre-trial order. That is reasonable under Mr. Kester's suggestion that it be split that way, after I had offered to pay half of it. That is what happened.

The Court: Mr. Brewster was defending Suter on your behalf?

Mr. Phillips: And the Houk Motor Company. I wouldn't say on my behalf I would say on behalf of Oregon now.

The Court: But at the time you designated Brewster to defend it was because Suter had been covered by your policy?

Mr. Phillips: I don't know about how Brewster got into that, your Honor. They told me a time or two that Brewster was not representing the U. S. F. & G., and then I got hold of George Brewster, and he told me that he had been approached by some independent [57] adjuster working for the United States Fidelity and Guaranty Company, and that he was hired by the United States Fidelity and Guaranty Company. So I said, "All right." I said, "If that is so, I think it is all right." I told him I would pay half.

The Court: You don't need a decision immediately on that point. Do you intend to appeal this case, Mr. Kester?

Mr. Kester: Yes, your Honor.

The Court: Therefore, it is desirable that I decide these other points immediately so that you may have that opportunity.

Mr. Phillips: We would like to have a cross-appeal if he is going to appeal it, your Honor. That is, in the event——

Mr. Kester: May I call attention to two matters that appear in the documents which the Court has not yet had a chance to examine. In the first place, it appears from Mr. Brewster's letter to the United States Fidelity and Guaranty Company dated July 8, 1950, five months before the trial over there, that he was employed by the General Adjustment Bureau to defend Suter. Now, may it be stipulated that the General Adjustment Bureau was acting for the U. S. F. & G.; not the Oregon Auto?

Mr. Phillips: I don't think there is any question about that, your Honor. I don't know anything about that. As I said before, that is what Casey told me.

Mr. Kester: It is in evidence, and by that it appears that the U. S. F. & G. had undertaken the defense at least by July. They made no tender to us until September. Now, when they did [58] make a tender I wrote this answer, this letter to Mr. Phillips.

Mr. Phillips: You don't need to read that.

Mr. Kester: I want to call it to the attention of the Court, because you read a portion of it and I want to read the remainder of it. I pointed out the exact language in the policy and I said that since the U. S. F. & G. policy is other valid and collectible insurance it appears that Suter is not covered. Now that is so long as the U. S. F. & G. is

valid and collectible insurance. Of course, when they pay out it ceases to be.

And in the final paragraph of that letter we expressed our willingness to defend Suter under a reservation of rights:

> "Since you have requested Oregon Auto to take over the defense of Suter in the Marion County action, we wish to advise you that Oregon Automobile Insurance Company is willing to take over that defense, upon the understanding that by doing so it does not admit any liability under its policy either to Suter or the U. S. F. & G. Company, and does not waive, surrender or in any way affect any of its rights or defenses," and so on.

In other words, if they had refused the defense we were willing to undertake it upon the understanding that all rights would be preserved. So as far as either one being obligated to step in and take it as far as the other one was concerned, both companies were willing to defend Suter upon the understanding that by doing so the rights themselves would not be prejudiced. [59]

The Court: Did the U. S. F. & G. defend under a reservation of rights?

Mr. Phillips: I don't know, your Honor, whether they did or not.

Mr. Kester: If they did not, then they are estopped to ever deny——

Mr. Phillips: Estopped to deny what?

Mr. Kester: Coverage.

Mr. Phillips: What are you talking about?

Mr. Kester: If you undertake to defend a case, then you certainly can't claim that we should pay your expenses for doing so. That would have been an admission that you are obligated to defend.

The Court: All right. In the next few days I will render a decision.

(Thereupon proceedings in the above matter on said day were concluded.) [60]

REPORTER'S CERTIFICATE

I, John S. Beckwith, an Official Reporter of the above-entitled Court, do hereby certify that on March 19, March 28 and April 2, 1951, I reported in shorthand the proceeding had in the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 60, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated this 16th day of April, 1951.

/s/ JOHN S. BECKWITH,
Official Reporter.

[Endorsed]: Filed August 13, 1951.

[Title of District Court and Cause.]

DOCKET ENTRIES

1951

Jan. 12—Filed petition for declaratory judgment.

Jan. 12—Issued summons—to marshal.

Jan. 22—Filed summons with return.

Feb. 1—Filed answer of defs. Oregon Automobile Ins. Co., Houk Motor & Redmond Motor.

Feb. 5—Filed copy answer of defs. Oregon Automobile Ins. Co., Houk Motor & Redmond Motor with acceptance of service by W. K. Phillips.

Feb. 6—Filed answer of defendants William and Beulah Morris and cross-complaint.

Feb. 8—Filed answer of deft. Oregon Automobile Ins. Co. to cross-complaint of deft. Beulah Morris.

Feb. 19—Entered order setting for pre-trial conference Mar. 19 and trial Mar. 19 at 2 p.m.

Mar. 19—Filed & entered pre-trial order.

Mar. 19—Record of trial & submitted.

Mar. 28—Record of oral opinion for plft. & order setting for further argument on Monday, April 2, 1951 at 2:00 p.m.

Mar. 30—Filed petition of atty. Samuels for attorneys' fees.

Mar. 30—Filed petition of atty. Phillips for attorney's fees.

Apr. 2—Record of hearing on certain questions of law.

1951

Apr. 23—Filed transcript of proceedings March 19, 1951.

June 20—Record of oral opinion (in favor of pltf.).

July 19—Filed & entered findings of fact and conclusions of law.

July 19—Filed & entered judgment and decree.

Aug. 13—Filed notice of appeal by defendants and copies mailed to P. H. & S. and V. & S.

Aug. 13—Filed transcript of proceedings March 19-28, 1951 and April 2, 1951.

Aug. 13—Filed designation of contents of record on appeal.

Aug. 17—Filed supersedeas bond on appeal.

Aug. 17—Filed amended designation.

Aug. 17—Filed and entered order to send exhibits.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of petition for declaratory judgment, Answer of Oregon Automobile Insurance Co., Answer of William Morris, et al., Answer of Oregon Automobile Insurance Co. to cross-complaint, order for pre-trial conference, pre-trial order, oral opinion, order setting cause for argument, petition of Attorney

Samuels for fees, petition of Attorney Phillips for fees, findings of fact and conclusions of law, judgment and decree, notice of appeal by Oregon Automobile Insurance Company, supersedeas bond, order to send exhibits to Court of Appeals, designation of contents of record, amended designation, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 5890, in which the United States Fidelity & Guaranty Company, a corporation, is plaintiff and appellee, and the Oregon Automobile Insurance Company is defendant and appellant, and William Morris and Beulah Morris are defendants, and appellees; that the said record has been prepared by me in accordance with the amended designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a duplicate transcript of testimony of March 19, March 28, and April 2, 1951, filed in this office in this cause, together with exhibits Nos. 1, 2, 11 to 20 inc., 23 to 26 inc.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 21st day of August, 1951.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy. [19]

[Endorsed]: No. 13092. United States Court of Appeals for the Ninth Circuit. Oregon Automobile Insurance Company, Appellant, vs. United States Fidelity and Guaranty Company, a Corporation, Beulah Morris and William Morris, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed September 12, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13092

OREGON AUTOMOBILE INSURANCE COMPANY,

Appellant,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, RAYMOND SUTER, WILLIAM MORRIS and BEULAH MORRIS,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant, Oregon Automobile Insurance Company, hereby submits the following statement of points on which it intends to rely on the appeal of this cause:

1. The trial court erred in making and entering its conclusion of law No. I, which was as follows, to wit:

> That the Oregon Automobile Insurance Company by virtue of its policy of insurance Pre-Trial Ex. 2, did insure and cover Raymond Suter and did protect him against legal liability for damages arising out of the accident which occurred on the 15th day of October, 1949, between the Mercury automobile which he was driving and that driven by William Morris, in Deschutes County, Oregon.

2. The trial court erred in making and entering its conclusion of law No. II, which was as follows, to wit:

> That by virtue of its policy of insurance, the Oregon Automobile Insurance Company was required to defend the said Raymond Suter in all actions brought against him for damages arising out of that said accident and to pay all expenses of his defense, and any resulting judgments rendered against him up to the limits of their disclosed liability, but not more than One Hundred Thousand ($100,000.00) Dollars, and costs of defense.

3. The trial court erred in making and entering its conclusion of law No. III, which was as follows, to wit:

> That the policy of the Oregon Automobile Insurance Company, provides the primary coverage and insurance insuring the said Raymond Suter, and that policy written by the U. S. Fidelity and Guaranty Company "Pre-Trial Ex. I," is excess insurance and secondary to that provided by the defendant, Oregon Automobile Insurance Company and that there is not, nor was there any liability on the part of the U. S. Fidelity & Guaranty Company to defend Raymond Suter, or pay any judgments against him until the Oregon Automobile Insurance Company had expended the full amount of its coverage.

4. The trial court erred in making and entering

its conclusion of law No. IV, which was as follows, to wit:

> That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Thousand Four Hundred Seventy-Four and 83/100 ($7,474.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 20th day of November, 1950.

5. The trial court erred in making and entering its conclusion of law No. V, which was as follows, to wit:

> That Beulah Morris is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company, the sum of Two Hundred and Fifty ($250.00) Dollars attorneys fees for prosecuting their declaratory judgment suit.

6. The trial court erred in making and entering its conclusion of law No. VI, which was as follows, to wit:

> That the plaintiff the U. S. Fidelity and Guaranty Company is entitled to recover off of and from the defendant, Oregon Automobile Insurance Company the sum of Seven Hundred Forty-five and 83/100 ($745.83) Dollars, together with interest thereon at the rate of (6%) Six per cent per annum from the 26th day of December, 1950.

7. The trial court erred in making and entering its conclusion of law No. VII, which was as follows, to wit:

That Beulah Morris is not entitled to any recovery from the plaintiff the U. S. Fidelity and Guaranty Company.

8. The trial court erred in making the following determination and declaration in its judgment and decree dated July 19, 1951, to wit:

That the insurance policy issued by the Oregon Automobile Insurance Company, policy #332583, did insure and cover Raymond Suter and that the said Oregon Automobile Insurance Company is required to pay on behalf of the said Raymond Suter all sums which he became legally obligated to pay, and all damages and costs assessed against him, because of personal injury or property damages sustained and suffered by either or both William Morris and Beulah Morris by virtue of that said accident which happened on or about the 15th day of October, 1949, in the county of Deschutes, state of Oregon.

9. The trial court erred in making and entering the following determination and declaration in its judgment and decree dated July 19, 1951, to wit:

That the said policy of insurance written by the Oregon Automobile Insurance Company is primary insurance for the benefit of the said Raymond Suter, and the policy made, executed and delivered by the plaintiff, United States Fidelity and Guaranty Company, is excess insurance to that written by the Oregon Automobile Insurance Company, or secondary, and

that the plaintiff, United States Fidelity and Guaranty Company is not required to pay or to assume any obligation whatsoever by virtue of its policy for the legal liability of Raymond Suter to William Morris and or Beulah Morris until such time as the Oregon Automobile Insurance Company has expended the full face of its policy, namely $100,000.00.

10. The trial court erred in awarding judgment against the Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of $7,360.00, plus costs in the sum of $114.43, together with interest on the said sums at the rate of 6% per annum from the 27th day of November, 1950.

11. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the defendant Beulah Morris in the sum of $250.00 attorney's fees.

12. The trial court erred in awarding judgment against the defendant Oregon Automobile Insurance Company and in favor of the plaintiff United States Fidelity & Guaranty Company for the sum of $745.83, together with interest thereon at the rate of 6% per annum from the 26th day of December, 1950.

13. The trial court erred in refusing to grant judgment in favor of the defendant Beulah Morris and against the plaintiff United States Fidelity and Guaranty Company.

14. The trial court erred in refusing to hold that

with respect to the action brought by Beulah Morris in Marion County, the policy of Oregon Automobile Insurance Company does not apply to defendant Raymond Suter, and said Oregon Automobile Insurance Company was and is under no obligation whatsoever with respect to his defense, or any expense arising therefrom.

15. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by said Beulah Morris, in which judgment was rendered against defendant Suter, defendant Oregon Automobile Insurance Company was under no obligation with respect to the defense of said Raymond Suter, and is under no obligation with respect to the expense thereof or to payment of said judgment against Raymond Suter, costs or interest, until plaintiff herein has applied upon payment of said judgment the limits of its said policy of insurance.

16. The trial court erred in refusing to hold that with respect to the action brought in Deschutes County by William Morris, defendant Oregon Automobile Insurance Company was not and is not obligated under its policy of insurance as to defendant Raymond Suter with respect to the cause of action for personal injuries to said William Morris or the cause of action for property damage of said William Morris, nor with respect to the cause of action for loss of consortium arising out of personal injuries to Beulah Morris until plaintiff has exhausted the limits of its policy of insurance.

17. The trial court erred in refusing to hold that plaintiff herein was and is required to accept liability and defend the action brought by William Morris against Raymond Suter in the Circuit Court of the State of Oregon for the County of Deschutes, on behalf of defendant Raymond Suter, pursuant to the terms of plaintiff's said policy of insurance.

18. The trial court erred in refusing to hold that plaintiff herein is required to satisfy the judgment in the action of Beulah Morris against Raymond Suter, No. 7784 in Deschutes County, Oregon, up to and including the limits of plaintiff's liability under its said policy.

19. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to the plaintiff in any amount.

20. The trial court erred in refusing to hold that the defendant, Oregon Automobile Insurance Company, is not indebted to defendant Beulah Morris in any amount at this time, and will not be indebted to her in any amount until plaintiff has exhausted the limits of liability of its insurance as to the judgment in her favor in Deschutes County.

21. The trial court erred in refusing to hold that neither the plaintiff nor the defendants Beulah Morris or William Morris are entitled to recover attorneys fees in this cause from the Oregon Automobile Insurance Company.

22. The trial court erred in refusing to hold that the policy of plaintiff was and is valid and collectible insurance available to and covering said

Raymond Suter with respect to liability arising out of said accident, within the meaning of the policy of Oregon Automobile Insurance Company.

23. The trial court erred in refusing to hold that the policy of Oregon Automobile Insurance Company was not and is not valid and collectible insurance available to or covering said Raymond Suter with respect to liability arising out of said accident.

Respectfully submitted,

/s/ RANDALL B. KESTER,
Of Attorneys for Appellant,
Oregon Automobile Ins. Co.

Service of copy acknowledged.

[Endorsed]: Filed September 15, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF PRINTED RECORD ON APPEAL

Appellant, Oregon Automobile Insurance Company, hereby designates as material to the consideration of the appeal herein, and for inclusion in the printed record on appeal, the entire record and all proceedings and evidence in the action, more particularly described as follows, to wit:

1. Petition for declaratory judgment (Transcript, document No. 1);

2. Answer of defendants Oregon Automobile Insurance Company, Houk Motor Company and Red-

mond Motor Company (Transcript, document No. 2);

3. Answer and cross-complaint of William and Beulah Morris (Transcript, document No. 3);

4. Answer of defendant Oregon Automobile Insurance Company to cross-complaint of defendant Beulah Morris (Transcript, document No. 4);

5. Order setting for pre-trial conference (Transcript, document No. 5);

6. Pre-trial order (Transcript, document No. 6);

7. Record of oral opinion for plaintiff and order setting for further argument (Transcript, document No. 7);

8. Petition of attorney Samuels for attorney's fees (Transcript, document No. 8);

9. Petition of attorney Phillips for attorney's fees (Transcript, document No. 9);

10. Findings of fact and conclusions of law (Transcript, document No. 10);

11. Judgment and decree (Transcript, document No. 11);

12. Defendants' notice of appeal (Transcript, document No. 12);

13. Transcript of proceedings of March 19 and 28 and April 2, 1951 (Transcript, document No. 13);

14. Order for transmittal of exhibits (Transcript, document No. 14);

15. Supersedeas bond on appeal (Transcript, document No. 15);

16. Designation of contents of record on appeal (Transcript, document No. 16);

17. Amended designation of contents of record on appeal (Transcript, document No. 17);

18. Transcript of docket entries (Transcript, document No. . .);

19. Clerk's certificate of transcript (Transcript, document No. . .);

20. All exhibits;

21. Appellant's statement of points on which appellant intends to rely;

22. This designation of contents of printed record on appeal.

Respectfully submitted this 13th day of September, 1951.

/s/ RANDALL B. KESTER,
Of Attorneys for Appellant,
Oregon Automobile Ins. Co.

Service of copy acknowledged.

[Endorsed]: Filed September 15, 1951.